In the Supreme Court

Appeal from the Court of Appeals
Whitbeck, P.J., and Holbrook, Jr., and Zahra, JJ.

Sandra Gail Fultz and Otto Fultz,
Plaintiffs-Appellees,

v.

Docket No. 121613

Creative Maintenance, Ltd.,
Defendant-Appellant.

BRIEF ON APPEAL OF PLAINTIFFS-APPELLEES SANDRA GAIL FULTZ AND OTTO FULTZ

ORAL ARGUMENT REQUESTED

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STATE OF MICHIGAN

IN THE SUPREME COURT

SANDRA GAIL FULTZ AND
OTTO FULTZ,

Plaintiffs-Appellees,

vs

UNION-COMMERCE ASSOCIATES LIMITED PARTNERSHIP, COMM-CO EQUITIES, NAMER JONNA, ARKAN JONNA, LAITH JONNA, MOSHIN KOUZA, AND GLADYS KOUZA,

Defendants,

and

CREATIVE MAINTENANCE, LTD.,

Defendant-Appellant.
_____/

Supreme Court Docket No. 121613

Court of Appeals No. 224019

Lower Court Case No. 95-501433 NO
Oakland County Circuit Court

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PLAINTIFFS'/APPELLEES' BRIEF ON APPEAL

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EXHIBIT LIST

STATEMENT OF JURISDICTION

This court has proper jurisdiction over this cause of action pursuant to MCR 7.301 (A)(2), by leave granted subsequent to a decision by the Michigan Court of Appeals. Leave was granted by this Honorable Court on April 8, 2003.

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STATEMENT OF QUESTIONS PRESENTED

I. Defendant owed Plaintiff a common law duty of reasonable care

A. Defendant Creative Maintenance, who had a contractual duty to the premises owner to plow and salt the owner's Farmer Jack parking lot, has a common law duty to exercise ordinary care in the performance of its contractual duties for the safety of foreseeable users of the parking lot. Does Plaintiff have a legally viable claim against the Defendant?

Trial Court answered: "Yes"

Court of Appeals answered: "Yes"

Plaintiffs/Appellees contend: "Yes"

Defendant/Appellant contends: "No"

B. Whether a person can establish a duty owed based on a contract to which that person is not a party, where neither party to the contract owes that person a duty outside the contract?

Plaintiffs/Appellees contend: "Yes"

Defendant/Appellant contends: "No"

II. Misfeasance is not a precursor to tort recovery by a non-contracting third party Plaintiff

A. Misfeasance and nonfeasance are distinctions relating to the burden of proof required where one party to a contract makes a tort claim against another party to the same contract. Is proof of misfeasance necessary for Plaintiff to maintain her tort claim against Defendant?

Trial Court answered: No

Court of Appeals answered: No

Plaintiffs/Appellees contend: "No"

Defendant/Appellant contends: "Yes"

B. Derbabian v Mariner's Point is entirely distinguishable from the case at bar and the Court of Appeals was correct in rejecting Defendant's reliance thereon. Derbabian relied on the lack of evidence and lack of notice in finding that Defendant did not owe a duty to the Plaintiff, facts which are different from those presented in the case at bar. Can Derbabian be applied to the case at bar?

Plaintiffs/Appellees contend: "No"

Defendant/Appellant contends: "Yes"

C. Defendant did commit misfeasance?

Because the Defendant actually undertook to perform its contractual duties to plow the snow from the parking lot in question but failed to use reasonable care in doing so thus leaving the lot in an icy and dangerous condition, Michigan Case Law establishes that the Defendant is guilty of misfeasance. Did the Defendant's actions amount to misfeasance?

Trial Court answered: This issue was neither addressed nor preserved by the Defendant.

Court of Appeals answered: This issue was neither addressed nor preserved by the Defendant.

Plaintiffs/Appellees contend: "Yes"

Defendant/Appellant contends: "No"

III. <u>The Open and Obvious Doctrine applies to premises liability Defendants only, and in the alternative the Open and Obvious Doctrine does not apply in this case because the hazardous condition was effectively unavoidable.</u>

The Open and Obvious defense is not available to a non-premises liability Defendant, such as Defendant Creative Maintenance, a snow removal contractor. In addition, even if the defense was available to this Defendant, the defense is inapplicable to the circumstances of this case in that the hazardous condition of the ice covered parking lot was effectively unavoidable. Is the Open an Obvious defense available to this Defendant and, if it is, is it applicable to the circumstances to this case?

Trial Court answered: " No"

Court of Appeals answered: "No"

Plaintiffs/Appellees contend: " No"

Defendant/Appellant contends: "Yes"

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IV. The Defendant failed to present sufficient evidence to warrant instructing the jury on Comparative Negligence

The Plaintiff had no reasonable alternative but to walk across the ice left by the negligence of the Defendant. Did the Defendant present any evidence sufficient to warrant an instruction regarding comparative negligence?

Trial Court answered: "No"

Court of Appeals answered: "No"

Plaintiffs/Appellees contend: "No"

Defendant/Appellant contends: "Yes"

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STATEMENT OF FACTS

The underlying cause of action arose from Plaintiff's slip and fall on an ice covered, Farmer Jack parking lot located in Commerce Township, Michigan, at 10:00 p.m. December 7, 1994. Plaintiff, Sandra Fultz, was a Farmer Jack employee whose shift ended at 10:00 p.m. that night. During one of her breaks, she had done some light shopping which was carried in four (4) plastic bags as she walked across the icy parking lot. Each and every person who was an eyewitness to the icy condition of the parking lot at the time Plaintiff fell agreed that the entire parking lot was covered with ice. Sue McCabe, Plaintiff's co-worker, was working the evening Plaintiff fell and observed the parking lot conditions. [Apx 68a, McCabe, p 62] Ms. McCabe agreed that the entire lot was covered with ice and was slippery. [Apx 68a-69a, McCabe, pp 62-63] Ms. McCabe testified that she personally almost slipped and fell a couple of times while walking out to assist the Plaintiff. [Apx 70a, McCabe, p65]

John Ward, one of the paramedics who tended to the Plaintiff in the parking lot, specifically recalled the night in question. [Apx 14b-15b, Ward, pp 176-77] Mr. Ward stated that his ambulance slid on the icy conditions in the parking lot when he arrived. [Apx 15b, Ward, p177] Mr. Ward testified that it was difficult for him to walk from the ambulance to the Plaintiff's location because it was slippery and extremely icy. [Apx 15b, 17b, Ward, p 178, 181]

Kim Coon, Plaintiff's co-worker, was working the night in question and confirmed that the lot was solid ice. [Apx 79a, Coon, p 165]

Plaintiff, Otto Fultz, was called at home and arrived while his wife Sandra was still on the ground. Mr. Fultz testified that the parking lot had a very rough, washboard, cobblestone effect from frozen ice which made it difficult to drive in the parking lot because it was slippery. [Apx 217a-218a, O. Fultz, pp 74-75] Mr. Fultz

confirmed that Mrs. Fultz fell near her vehicle in the aisleway where cars drive. [Apx 221a, O. Fultz, p 94] Plaintiff's injuries occurred shortly after 10:00 p.m. on December 7, 1994. [Apx 85a-86a, S. Fultz, pp 9-12]

Paul Gross was qualified by the Court as an expert meteorologist, as well as an expert in the relationship between salt and snow. [Apx 18b, Gross, p 103] Mr. Gross testified that he would not expect to see any places in the parking lot that were dry and clear that evening. [Apx 37b, Gross, p 141] A winter storm warning was issued the night before Plaintiff's fall, with snow accumulations for 18 continuous hours, from approximately 6:00 p.m. on the night of December 6, 1994 through approximately 1:00 p.m. on December 7, 1994. [Apx 19b-20b, 26b, Gross, pp 106-07, 119] Mr. Goss testified that plowing by 11:00 a.m. and a prudent application of salt would have significantly reduced hazardous conditions of the parking lot confronting the Plaintiff at 10:00 p.m. that night. [Apx 29b-30b, Gross, pp 126-28]

David Sherman, the owner of Defendant Creative Maintenance, Ltd. admitted that he was aware ahead of time, the day prior to Plaintiff's incident, that it was going to snow. [Apx 159a, Sherman, p 158] The National Weather Service, which Defendant Creative Maintenance relied upon regarding notice of approaching snow, was calling for a winter storm warning with 8" of snowfall through the afternoon of December 7, 1994 and freezing temperatures. [Apx 20b, Gross, pp 107-08; Apx 158a-160a, Sherman, pp 156-59] Defendant Creative Maintenance Ltd.'s answers to interrogatories, under oath, confirmed that it was "Creative Maintenance's obligation to plow this parking lot when the snow exceeded 1 1/2 inches and to apply salt after each plow" and this was confirmed at trial. [Apx 6b, Interrogatory No. 16; Apx 173a, Sherman, pp 185-86] Mr. Sherman testified that Defendant Creative Maintenance plowed this strip mall parking lot from

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approximately 4 a.m. to approximately 8 a.m. the morning that the Plaintiff fell. [Apx 201a, Sherman, pp41-42] He agreed it was still snowing when his crew left this lot to plow elsewhere. [Apx 203a, p 46] It continued to snow for about five hours after Defendant Creative Maintenance left this parking lot. [Apx 19b-20b, Gross, pp 106-08; Apx 203a-204a, Sherman, pp 46-47] Mr. Sherman acknowledged that his company did not salt any portion of the parking lot in which the Plaintiff fell, either the day before or the day of Plaintiff's fall. [Apx 169a-170a, 173a, Sherman, pp 178-79, 186]

Mr. Sherman testified that he recalled returning to this parking lot between 6:00 p.m. and 9:00 p.m. on December 7th, and he further "recalled" plowing the lot for a second time just prior to Plaintiff's fall. [Apx 206a, Sherman, p 51] At trial, however, Plaintiff effectively disputed that Mr. Sherman ever returned to this parking lot prior to her fall on December 7th, using Mr. Sherman's prior admissions that he had no recall of his company's activities in December of 1994 without looking at the company's maintenance records, and had no independent recollection of the condition of the parking lot in 1994 without looking at the same records. [Apx 155a-156a, Sherman, pp 149, 152] There was no bill, nor were there any records to support Mr. Sherman's assertions that he returned to this parking area to perform any maintenance after 8:00 a.m. on December 7th. [Apx 204a, 208a, Sherman, pp 47-48, 56] Defendant/Appellant asserts that the need for salt was "evaluated" by Mr. Sherman, but there is no support in the transcript for that statement. Therefore, Defendant's "recollection" four years after the fact, that he returned to the parking lot three or four hours before the Plaintiff fell was contradicted by Defendant's own pretrial admissions under oath. In addition, the abhorrent condition of the parking lot served to prove either that Mr. Sherman lied about returning to plow or that his "plowing" was extremely deficient and

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negligent.

When Plaintiff, Sandra Fultz, left the Farmer Jack to go home that evening, she was carrying two plastic grocery bags, with handles, in each hand and a gallon of milk, all of which she estimated to weigh approximately 20-25 pounds. [Apx 99a, S. Fultz, p 37] Plaintiff testified that because of the icy condition of the parking lot, she used extra precautions in approaching her car, watching the ground very closely, taking small steps, and in fact was looking at the ground just before she fell. [Apx 88a, S. Fultz, p 15] Plaintiff had no trouble seeing the parking lot surface. [Apx 99a, S. Fultz, p 38] Plaintiff's groceries did not prevent her from looking at the parking lot surface. [Apx 99a, S. Fultz, p 38] Plaintiff was not carrying groceries over her face and the lot was well lit. [Apx 100a, S. Fultz, p 39]

Kim Coon, Plaintiff's co-worker, testified that prior to Plaintiff's fall, Ms. Coon attempted to push a full cartload of groceries through the parking lot but could not get the cart to move because of the icy conditions and was therefore forced to return to the building to leave her cart while she went out to get her car. [Apx 79a, Coon, p 165] Ms. Coon verified that she had a lot of groceries that filled up the entire cart. [Apx 79a, Coon, pp 165-166] Ms. Coon confirmed that if she only had four bags of groceries, as did the Plaintiff, Ms. Coon would have walked across the parking lot to get to her car with groceries in hand. [Apx 79a, Coon, p 166]

When Plaintiff exited the store with grocery bags in hand, she saw a vehicle parked in front of the store, but did not realize that it was Kim Coon's car until the Plaintiff had already started walking out across the parking area. [Apx 116a, S. Fultz, p 71] Ms. Coon testified that there was no alternative route to get around the ice to her vehicle in the parking lot. [Apx 38b, Coon, p 173] Plaintiff, Sandra Fultz, testified that there was no alternative path or route to her car that did not

have ice on it. [Apx 87a, S. Fultz, p 13]

Plaintiff slipped on an icy ridge near her vehicle and sustained a trimalleolar fracture of her ankle and underwent open surgery to insert a 5 1/2" metal plate and nine screws that remain in her ankle to this day.

ARGUMENT I

A. CREATIVE MAINTENANCE, LTD. OWED A COMMON LAW DUTY TO THE PLAINTIFF TO USE ORDINARY CARE IN THE REMOVAL OF THE ACCUMULATIONS OF SNOW AND ICE FROM THE PREMISES.

Standard of Review

A trial court decision on a motion for a directed verdict is reviewed *de novo*. Dewitt Building Company, Inc. v. Auto-Owners Insurance Company, 2003 Mich. App LEXIS 1394 (June 12, 2003). (**Exhibit A**) The standard of reviewing the denial of a motion for a directed verdict or for judgment notwithstanding the verdict is that the testimony, and all legitimate inferences that may be drawn from it, must be viewed in the light most favorable to the non-moving party. If there are material issues of fact on which reasonable minds could differ, the matter is one properly submitted to the jury, because neither the trial court nor the appellate court has the authority to substitute its judgment for the jury. Butt v. Giammariner, 173 Mich. App 319; 433 NW2d 360 (1988); Di Franco v. Pickard, 427 Mich. 32; 398 NW2d 896 (1986); Matras v. Amoco Oil Co., 424 Mich. 675; 385 NW2d 586 (1986). In the case at bar, the trial court found that the Defendant did owe a duty of ordinary care to Plaintiff and the jury found the Defendant, Creative Maintenance, Ltd., breached its duty to the Plaintiffs, Sandra Gail Fultz and Otto Fultz. [Apx 281a]

Argument

A COMMON LAW DUTY TO USE ORDINARY AND REASONABLE CARE ARISES OUT OF CREATIVE MAINTENANCE, LTD.'S CONTRACT FOR SNOW REMOVAL.

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A party who, pursuant to contract, undertakes to perform services for the good of the public in general, has a duty to execute those services using ordinary care. Michigan jurisprudence has long recognized this duty of care owed to third parties where a Defendant voluntarily assumes a function that it is under no legal obligation to assume. See, e.g., Blackwell v. Citizens Insurance Company of America, 457 Mich. 662; 579 NW2d 889 (1998); Smith v. Allendale Mutual Insurance Company, 410 Mich. 685; 303 NW2d 702 (1981); Braun v. York Properties, Inc., 230 Mich. App. 138; 583 NW2d 503 (1998); Ray v. Transamerica Ins. Co., 46 Mich. App 647; 208 NW2d 610 (1973); Watson v. Employers Ins. Co of Wausau, 50 Mich. App 597; 213 NW2d 765 (1973); Olkowski v. Aetna Casualty & Surety Co., 53 Mich. App 497; 220 NW2d 97 (1974), aff'd 393 Mich. 758; 223 NW2d 296 (1974); Courtright v. Design Irrigation, Inc., 210 Mich. App 528; 534 NW2d 181 (1995).

This duty of care owed to third parties is more clearly expressed in **Section 324(A) of the Second Restatement of Torts, 2d,** p. 142, which provides:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to third persons for physical harm resulting from his failure to exercise reasonable care and to protect his undertaking, if:
>
> (a) his failure to exercise reasonable care increases the risk of harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."
> [Emphasis added]

The Michigan Supreme Court acknowledged the viability of a tort theory of liability pursuant to Section 324(A) in Smith, *supra at 705*. See also Courtright, *supra at 531* ["Section 324(A) of the Second Restatement of Torts has been

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accepted as a correct statement of Michigan law."] **Section 323 of the Second Restatement of Torts, 2d**, establishes an actor's liability for the negligent performance of rendering services to the person to whom the services were owed. Section 324(A) is a parallel provision concerning liability of performance benefiting third persons. Smith, *supra at 712 fn 17.*

Second Restatement of Torts, 2d, Section 324(A) is based on the common law rule, "That accompanying every contract is a duty to perform with ordinary care that thing agreed to be done, and that negligent performance constitutes a tort as well as a breach of contract." Clark v. Dalman, 379 Mich. 251, 261; 150 NW2d 755 (1967); Joyce v. Rubin, 249 Mich. App 231, 243; 642 NW2d 360 (2002); see also Courtright, *supra at 530-531*. In the third party context, the rule has been stated as follows: "Those foreseeably injured by the negligent performance of a contractual undertaking are owed a duty of care". Talucci v. Rachambault, 20 Mich. App 153, 161; 173 NW2d 740 (1969); see also Tucker v. Sandlin, 126 Mich. App 701, 704-705; 337 NW2d 637 (1983) [Relying in part on Section 324(A) to impose on the Defendant a duty to third parties to perform security guard service with reasonable care.] This common law duty of care exists separately and apart from the contract. See Talucci, *supra*; see also Auto-Owners Insurance Company v. Michigan Mutual Insurance Company, 223 Mich. 205, 212; 565 NW2d 907 (1997), quoting Osman v. Summer Green Lawn Care, Inc., 209 Mich. App 703, 708; 532 NW2d 186 (1995), overruled in part on other grounds, Smith v. Globe Life Insurance Company, 460 Mich. 446, 455; 597 NW2d 28 (1999).

Under this theory, a "breach of contractual duty causes injury to a third party, who is then allowed to bring a tort action." Commercial Unity Insurance Company v. Medical Protective Company, 426 Mich. 109, 124; 393 NW2d 479

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(1986). The duty owed to the public, by the Defendant, is that which accompanies every contract, a common law duty to perform with ordinary care the thing agreed to be done. Talucci v. Archambault, 20 Mich. App 153; 173 NW2d 740 (1969); Clark v. Dalman, 379 Mich. 251, 260-261; 150 NW2d 755 (1967); Scott v. Pyratech Security Systems, Inc., (2002) Mich. App. LEXIS 1460. (**Exhibit B**)

The Michigan Court of Appeals has analyzed this duty as follows:

> "Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by another, and such duty must be imposed by law...
>
> * * *
>
> Such duty of care may be a specific duty owing to the plaintiff by the defendant or may be a general one owed by the defendant to the public, of which the plaintiff is a part. Moreover, while this duty of care, as an essential element of actionable negligence, arises by operation of law, it may, and frequently does, arise out a contractual relationship, the theory being that accompanying every contract is a common law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract. But it must be kept in mind that the contract creates only the relation out of which arises the common law duty to exercise ordinary care. Thus, in legal contemplation, the contract merely creates the state of things which furnishes the occasion of tort. This being so, the existence of a contract is ordinarily a relevant factor, competent to be alleged and proved in a negligence action to the extent of showing the relationship of the parties and the nature and extent of the common law duty on which the tort is based." Osman, *supra at 708*, citing Clark v. Dalman, 379 Mich. 251, 260-261; 150 NW 2d. 755 (1967)

In imposing liability for breach of this duty, a reviewing court is concerned with whether it is appropriate public policy to impose liability for particular conduct. A court should not consider *whether the parties involved believe* liability exists. The question of what conduct is sufficient to impose liability does not rely solely on what a reasonable person with whom the party deals understands, but rather one of law in deciding whether liability should be imposed for the common good. Smith, *supra at 716*. Therefore, Defendant owed a common law duty arising out of the contract for snow removal services.

Defendant argues that the Plaintiff was not in privity of contract between the

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Defendant and the premises owner, and therefore is owed no duty. While it may be true that the Plaintiff is not owed a duty under the explicit provisions of the contract, the duty owed to the general public arises out of, and in addition to, Creative Maintenance, Ltd.'s contractual obligations. Osman, *supra at 710*. This contract is the basis for Defendant's common law duty to the Plaintiff. The Michigan Court of Appeals in Osman cited Commercial Unity Insurance Company v. Medical Protective Company, 426 Mich. 109, 124; 393 NW2d 479 (1986), in addressing the issue of privity of contract in third party tort cases by providing:

> "Whether a primary insurer owes a duty to act in good faith or with due care towards an excess insurer as well as the insured is analogous to the question whether a manufacturer owes a duty to act with due care toward an ultimate purchaser as well as a retailer of his product, or whether a professional who undertakes a service in a contract owes a duty to act with due care toward third parties who reasonably will be affected as well as toward the person with whom the professional makes the contract. *This court has held that in the case of a manufacturer and the professional, there is liability.*" (Osman, *supra at 709* citing Commercial Unity, *supra 124 fn 5*) [Emphasis added]

The Michigan Court of Appeals validated the theory that a contract between two parties gives rise to contractual duties. (Osman, *supra*) Breach of these contractual duties may cause injury to a third person, not in privity of contract, who may bring a tort action. [See Spence v. Three Rivers Building and Masonry Supply, Inc., 353 Mich. 120; 90 NW2d 873 (1958), which provided that a manufacturer's breach of an implied warranty of merchantability in a contract of sale gave rise to a tort action in favor of an injured ultimate consumer of the product without regard to privity.] [See also Clark v. Dalman, 379 Mich. 251; 150 NW2d 755 (1967), a repair contractor's breach of the contractual duty to notify and inspect work completed and his breach of the common law duty to act reasonably so as not to endanger licensees or invitees, gave rise to a tort action in favor of an injured inspector.]

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The Michigan Supreme Court has found that although a defendant attempts to limit its liability for slips and falls in his contract with a property owner, a contract will not shield a defendant from liability to an injured plaintiff. (Clark, *supra*) A defendant owes the plaintiff-as an employee, tenant and invitee, plaintiff certainly was a foreseeable user of this parking lot-the common law duty separate and apart from the contract itself. (Clark, *supra*) Therefore, the Michigan Supreme Court has held that even though plaintiff is not in privity of the contract, a plaintiff, as a member of the general public for whom these services were rendered, is owed a duty of ordinary care by the defendant. (Clark, *supra at 260-261*)

The Michigan Court of Appeals extended this duty to an injured plaintiff who was not in privity of the contract in McBride v. Pinkerton's Inc., unpublished *per curium* opinion of Court of Appeals, Case #202147, 202204 released July 2, 1999 (**Exhibit C**). In Pinkerton's, the Michigan Court of Appeals held that even in the absence of a special relationship or contractual relationship, a duty arises to injured third parties where a defendant voluntarily assumes a function that it is under no legal duty to assume. Pinkerton's, *supra*, pg 3 citing Blackwell v. Citizens Insurance Company of America, 457 Mich. 662 ; 579 NW 2d 889 (1998); Smith v. Allendale Mutual Insurance Company 410 Mich. 685; 303 NW 2d. 702 (1981); Braun v. York Properties, Inc., 230 Mich. App 138; 583 NW 2d. 503 (1998); Courtright v. Design Irrigation, Inc. 210 Mich. App 528; 534 NW 2d. 181 (1995). The Michigan Court of Appeals acknowledged the common law duty owed by contracting parties to third persons. The Court of Appeals provided:

> "We conclude that the nature of Pinkerton's undertaking to provide security services at Wellington Place should have caused Pinkerton to recognize that the services were designed, at least in part, for the protection of Wellington Place (tenants). Accordingly, we find, as a matter of law, that Pinkerton voluntarily assumed a duty to provide a limited level of security encompassed the duties discussed above." Pinkerton's, *supra at pg 4*.

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In the case at bar, a tort action is brought arising out of, and in addition to, the specific provisions of the snow removal contract. As such, contracting parties may breach a specific provision of the contract and yet execute their duties with reasonable care, therefore precluding liability to injured third persons. A corollary of this position provides that a party may execute the specific terms of the contract, yet do so in the absence of ordinary and reasonable care, thereby causing injury to third parties. A breach of a specific provision of the contract would give rise to a breach of contract cause of action on behalf of the contracting parties. An example would be a specific contractual provision that provides that all snow removal services must be performed by 8:00 a.m. If the snow removal company fails to remove the snow until 9:00 a.m., it is in breach of a specific contractual provision giving rise to a breach of contract cause of action. If those services are performed using reasonable care, there would be no breach of duty. If the plowing is performed before 8:00 a.m., however, but the services are executed without due care causing injury to third persons, a breach of contract may not have occurred but the breach of duty may give rise to a tort action for injuries to third persons.

In sworn answers to pretrial Interrogatories, admitted as evidence during trial, Defendant Creative Maintenance admitted it was contractually obligated to plow the snow after an accumulation of one 1½ inches and salt after "each plow". [Apx 6b, Interrogatory No. 16; Apx 172a-173a, Sherman, pp 183-86]

At trial Defendant Creative Maintenance, Ltd. changed its position and David Sherman, Defendant's owner, testified that Defendant was obligated to salt "as needed". In either case, Defendant Creative Maintenance, Ltd. had a duty to exercise reasonable care in rendering those services. Relevant to this case was

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Defendant's contractual responsibility to plow and salt the lot.

Plaintiff fell in the Farmer Jack lot at approximately 10 p.m. on December 7, 1994. Snow had been predicted for at least two days and a winter storm warning had been issued on December 6, 1994. It began to snow about 6:00 p.m. on December 6, 1994 and snowed without stopping for 18 consecutive hours when it stopped at about 1:00 p.m. on December 7, 1994.Defendant, through its owner David Sherman, admitted that he had actual notice that it was going to snow and in fact arrived with two plow trucks at the Farmer Jack lot at about 4:00 a.m. on December 7, 1994 and left at approximately 8:00 a.m. based on it customarily taking four hours to plow the entire mall parking lot. When the trucks left the lot, Mr. Sherman admitted he was aware that it was still snowing but his crew had to go to other lots he was contractually obligated to plow. He admits that he did not apply salt to this lot despite, depending on which sworn version is to be believed, his obligations to salt after each plow or as needed. By the Defendant's own admission he breached his duty to salt after each plow. If Defendant's "salt as needed" is to be believed, then the evidence clearly and uncontrovertibly established the need for salt. About eight inches of snow fell, with freezing temperatures, and it was still snowing for five hours after Defendant left the lot. Plaintiff's expert meteorologist testified that if Defendant had put salt down when the Defendant was on the premises performing snow removal, it would have been highly effective at reducing the hazards and danger of snow and ice encountered by the Plaintiff. All witnesses agree that this lot was full of lumpy, ridged ice the evening of December 7, 1994. Certainly, if Defendant has used ordinary care in plowing the snow and applied salt, that condition would not have existed.

Defendant, Creative Maintenance, Ltd., failed to use ordinary and reasonable care in executing these snow removal services. This breach of duty was the direct

and proximate result of Plaintiff's injuries. Therefore, Defendant, Creative Maintenance, Ltd., was properly found liable for a breach of duty independent of a specific breach of contract.

B. PLAINTIFF CAN STILL BE OWED A DUTY BASED UPON A CONTRACT TO WHICH SHE WAS NOT A PARTY, WHERE NEITHER PARTY TO THE CONTRACT OWES PLAINTIFF THAT DUTY OUTSIDE OF THE CONTRACT.

In the case at bar, Defendant Creative Maintenance entered into a verbal contract with the Defendant Comm-Co Equities (the owner of the property and not a party to this appeal) to plow and salt the lot in question. In this instance, the Defendant owner owes a duty to Plaintiff independent of the contract.

A premises owner has a duty to a business invitee to maintain the premises in a reasonably safe condition. Kroll v. Katz, 374 Mich. 364; 132 NW2d 27 (1965); Riddle v. McLouth Steel Products 440 Mich. 85 (1992). A premises owner also has a duty to inspect the premises to discover possible dangerous conditions if a reasonable person would have inspected under the circumstances. Riddle, *supra at 102*; SJI 2nd 19.03. Premises owners owe business invitees the duty to exercise reasonable care for the invitee's protection. Bryan v. Brannen, 180 Mich. App 87; 446 NW2d 847 (1989); Orel v. Uni-Rak Sales Company, Inc., 454 Mich. 564, 567; 563 NW2d 241 (1997); Anderson v. Wiegand, 223 Mich. App 549, 553-554; 567 NW2d 452 (1997). This duty was owed by Defendant property owner, Comm-Co Equities, independent of contract for snow removal, rendering them liable for Plaintiff's injuries.

Although Defendant Comm-Co Equities owed a duty to the Plaintiff independent of its contract with Defendant Creative Maintenance, this Court, in granting leave to appeal, directed the parties to address the issue of whether Plaintiff can still be owed a duty based on a contract to which she was not a party, where neither party to the contract owes Plaintiff a duty outside of the contract.

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Section 324(A) of the Second Restatement of Torts, 2d, p. 142, provides:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to third persons for physical harm resulting from his failure to exercise reasonable care and to protect his undertaking, if:
>
> (a) his failure to exercise reasonable care increases the risk of harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."
>
> [Emphasis added]

In the absence of a "special relationship" one party generally does not owe a duty to another. Williams v. Cunningham Drug Store, Inc., 429 Mich. 495, 498-499; 418 NW2d 381 (1988). Michigan law generally recognizes a "special relationship" as it arises between invitor-invitee, common carrier-passenger, innkeeper-guest, landlord-tenant and doctor–patient. Murdock v. Higgins 454 Mich. 46, 55 n 11; 559 NW2d 639 (1997); Dykema v. Gus Macker Enterprises, Inc., 196 Mich. App 6, 8; 492 NW2d 472 (1992).

However, even in the absence of a special relationship, Michigan Courts have recognized a duty where a defendant voluntarily assumes a function that it was under no legal obligation to assume. Blackwell v. Citizens Insurance Company of America, 457 Mich. 662; 579 NW2d 889 (1998); Smith v. Allendale Mutual Insurance Company, 4109 Mich. 685; 303 NW2d 702 (1981); Braun v. York Properties, Inc., 230 Mich. App 138; 583 NW2d 503 (1998); Courtright v. Design Irrigation, Inc., 210 Mich. App 528; 534 NW2d 181 (1995).

In McBride v. Pinkerton's Inc., Michigan Court of Appeals No. 202147, unpublished, (1999) (**Exhibit C**), plaintiff maintained a cause of action relying on

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Section 324(A) to prove that the Defendant security company owed a duty of ordinary care to the plaintiff. Neither Pinkerton's nor the landlord owed a duty to protect against third party criminal actions. Plaintiff argued that pursuant to the security contract, Pinkerton's assumed a duty to provide the property owner with security services. Pinkerton's Inc., *supra at 4*. Pursuant to the security contract, Pinkerton had a duty to observe and notify their superiors or police of reportable activity; a duty to ensure that guests sign in and out; a duty to ensure that intercom procedures where followed; a duty not to socialize when working; a duty to contact police if a situation developed that security personnel could not control. Pinkerton's Inc., *supra at pg. 4*.

The Court of Appeals held, in review of these contractual duties combined with testimony of Pinkerton's employees, that Pinkerton's undertaking to provide security services should have caused Pinkerton's to recognize that those services were designed for the protection of the tenants of the apartment complex. Pinkerton's Inc., *supra at pg 4*. Therefore, the Court of Appeals held that Pinkerton's voluntarily assumed a duty to provide a level of security for the protection of the tenants residing at the apartment complex. Pinkerton's Inc., *supra at pg 4*.

Also, products liability law calls for certain duties and liability on the part of the manufacturer of defective or hazardous products, to foreseeable users of the products, even where there is no privity of contract. See, generally, Spencer v. Three Rivers Building and Masonry Supply, *supra* and Commercial Unity, *supra*.

In the case at bar, Creative Maintenance, Ltd. is in a similar position to the security company in Pinkerton's. Here, Plaintiff is both an invitee and a tenant; she is an employee of tenant Farmer Jack, she actually worked that day and she

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bought groceries. Defendant Creative Maintenance entered into a contract for the removal of snow and ice from Comm-Co Equities' property. This property consisted of, among other businesses, a Farmer Jack which was open to the public. Creative Maintenance, Ltd. had actual knowledge that it was assuming a contractual obligation for the protection of patrons and tenants of that shopping center. (Apx 167a, Sherman, p 173) Defendant undertook the duty, requiring reasonable care. Defendant breached that duty by negligently performing snow and ice removal services. As a direct and proximate result of that breach, Plaintiff, a Farmer Jack employee and patron, slipped and fell on the icy conditions caused by Defendant's negligent actions. Therefore, Plaintiff was owed a duty of ordinary care, regardless of whether this Defendant had a contractual duty and even though Plaintiff was not a party to the contract.

ARGUMENT II

A. MISFEASANCE IS NOT A PRECURSOR TO TORT RECOVERY BY A NON-CONRACTING THIRD PARTY PLAINTIFF.

Standard of Review

A trial court decision on a motion for a directed verdict is reviewed *de novo*. Dewitt Building Company, Inc. v. Auto-Owners Insurance Company, 2003 Mich. App LEXIS 1394 (June 12, 2003). (**Exhibit A**) The standard of reviewing the denial of a motion for a directed verdict or for a judgment notwithstanding the verdict is that testimony, and all legitimate inferences that may be drawn from it, must be viewed in the light most favorable to the non-moving party. Norman Forge and NMF, Inc. v. Leonard Smith, 485 Mich. 198; 580 NW2d 876 (1998). If there are material issues of fact on which reasonable minds could differ, the matter is one properly submitted to the jury, because neither the trial court nor the appellate court has the authority to substitute its judgment for the jury. Butt v.

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Giammariner, 173 Mich. App 319; 433 NW2d 360 (1988); Di Franco v. Pickard, 427 Mich. 32; 398 NW2d 896 (1986); Matras v. Amoco Oil Co., 424 Mich. 675; 385 NW2d 586 (1986). In the case at bar, the jury found the Defendant, Creative Maintenance, Ltd., breached its duty to the Plaintiffs, Sandra Gail Fultz and Otto Fultz.

Argument

Snow removal contractors are liable for injuries to non-contracting third parties for failure to use ordinary and reasonable care in the removal of dangerous and hazardous conditions regardless of misfeasance.

Defendant's liability to Plaintiff arises from breach of a common law duty to exercise reasonable care. That theory is expressed in **Section 324(A) of the Second Restatement of Torts, 2d,** p. 142, which provides:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to third persons for physical harm resulting from his failure to exercise reasonable care and to protect his undertaking, if:
>
> (a) his failure to exercise reasonable care increases the risk of harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

The Restatement has been accepted as a correct statement of Michigan Law. Courtright v. Design Irrigation, 210 Mich App 528 (1995); McMiddleton v Otis Elevator Co., 193 Mich App 418, 427-28, 362 N.W.2d 812 (1984)

Defendants would argue that in the absence of actionable misfeasance, it is not liable for the injuries sustained by the Plaintiffs.

Defendants argument is founded in Hart v. Ludwig, 347 Mich. 559; 790 NW2d 895 (1956), and its progeny. In Hart, *supra*, the Michigan Supreme Court discussed the distinction between actionable misfeasance and nonfeasance in a

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contractual setting between contracting parties. The facts of Hart, distinguishable from the case at bar, are important in understanding why the Court maintained a distinction between misfeasance and nonfeasance. In Hart, the Defendant field worker entered into an agreement with the Plaintiff to maintain and care for the Plaintiffs' orchard. The Defendant failed to perform his obligations pursuant to the oral agreement. Plaintiff brought a *tort* action claiming the Defendant "refused and neglected" to abide by the agreement. Hart, *supra at 560*.

The Michigan Supreme Court analyzed the issue of whether Plaintiff can bring a viable *tort* action against the other party to the contract, arising from a breach of the contract. In Hart, the court struggled with the "dichotomy" of both tort and contract theories arising out of a breach of a contractual obligation between contracting parties. Hart, *supra at 561*. In an effort to elaborate on the distinction between the viability of the two theories, the Michigan Supreme Court found that the "distinction was one between misfeasance and nonfeasance". Hart, *supra at 561*. Elaborating further, the Hart Court held,

> "The distinction is this: if a party undertake to perform work, and proceed on the employment, he makes himself liable for any misfeasance in the course of that work; but if he undertakes, and does not proceed on the work, no [tort] action will lie against him for nonfeasance." Hart, *supra at 562*.

The Hart Court cited its earlier decision in Chase v. Clinton County, 241 Mich. 478, which held, "A distinction is made, however, in case of nonfeasance in performance of a contract, it being held that an action sounding in tort cannot be found thereon." Hart, *supra at 562.*

> "The cases are numerous and confusing as to the dividing line between actions of contract and of tort, and there are many cases where a man may have his election to bring either action. Where the cause of action arises merely from a breach of promise, the action is in contract." *(emphasis added)* Hart, *supra at 563*.

In Hart, the Supreme Court makes a distinction between tort and contract

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theories where the parties involved in litigation are in privity of contract. The privity between the parties could potentially afford either a breach of contract action or recovery in tort. In essence, the Court is saying the appropriate cause of action between two contracting parties, for failure to perform pursuant to the contract, is breach of contract. For the damaged contracting party to have a tort action, the negligent action must rise to the level of "misfeasance." If it does not, the damaged party will still be able to pursue a breach of contract claim. In Hart, the status of the parties as being in privity of contract is an important factor and in fact the basis of the court's analysis regarding misfeasance.

The status of the parties in the case at bar is different. Plaintiff and Defendant here did not have a contract with each other. Plaintiff does not have a viable breach of contract action against Defendant. Plaintiff, injured by the negligent actions and negligent inactions of the Defendant, has a viable action in tort for the breach of Defendant's common law duty to use ordinary and reasonable care. Courtright v. Design Irrigation, Inc. 210 Mich. App 528; 534 NW 2d. 181 (1995); Osman v. Summer Green Lawn Care, Inc., 209 Mich. App 703, 708; 532 NW2d 186 (1995). The Supreme Court did not raise the burden of proof to "misfeasance" for a non-contracting party. This conclusion is evident upon reading Ludwig in conjunction with the long line of case law relying on the Second Restatement of Torts, none of which require "misfeasance" where third party tort liability is involved.

Defendant Creative Maintenance is misguided in its reliance on Rinaldo's Construction Corporation v. Michigan Bell Telephone Company, 454 Mich 65; 559 NW2d 647 (1997). In Rinaldo's, the Plaintiff alleged negligence against Michigan Bell for failure to maintain phone service resulting in lost business revenue for Plaintiff. The issue, analysis and conclusion focused solely on the question of

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jurisdiction, and how the alleged duties and contractual obligations of defendant Michigan Bell determined whether jurisdiction remained in the Circuit Court or with the Michigan Public Service Commission. The issue in Rinaldo's was stated succinctly as follows: " Specifically, we address the question of whether a Circuit Court may entertain a cause of action against a telephone company alleging negligence, despite the Michigan Public Service Commissions' primary jurisdiction over customer claims arising under MPSC tariffs." Rinaldo's, at 66-67.

The MPSC is the administrative body charged with the authority to oversee and regulate telephone services and rates. The tariffs, filed with and approved by the MPSC, govern the contractual relationship between a telephone company and its business and residential customers. Rinaldo's, p. 67, fn1. The Court concluded that the claims and remedies were governed by the contract between the parties and jurisdiction remained with the MPSC. The Court analyzed the relationship and remedies available between the two contracting parties, not a third-party as in the case at bar. Moreover, the Rinaldo's Court emphasized that its conclusion was also based on the fact that although the plaintiff attempted to couch its allegations in tort, "there is no allegation that this conduct by the defendant constitutes tortious activity in that it caused physical harm to persons or tangible property". Id. at 85 and 89.

Therefore, the Rinaldo's decision does not apply to the case at bar because (1) it is a case concerned only with the issue of jurisdiction; (2) it analyzed the relationship between two contracting parties, not a third-party; and (3) there were no allegations of tortious activity and physical harm to persons or property, unlike the present case.

Assuming, arguendo, that the Rinaldo's analysis is applicable to the case at bar, which Plaintiffs deny, analyzing the difference between nonfeasance and

misfeasance is not simply a question of action or inaction, as suggested by the Defendant. Hart v. Ludwig, supra, also relied on by Defendant, further analyzed the distinction between misfeasance and nonfeasance and provides support for Plaintiff's cause of action:

> There are, it is recognized, cases in which an incident of nonfeasance occurs in the course of an undertaking assumed. Thus, a surgeon fails to sterilize his instruments, an engineer fails to shut off steam, Kelly v. Metropolitan R. Co., a builder fails to fill a ditch in a public way, Ellis v. McNaughton, 76 Mich 237. These are all, it is true, failures to act, each disastrous detail, in itself, a "mere" nonfeasance. But the significant similarity relates not to the slippery distinction between action and non-action but to the fundamental concept of "duty"; in each a situation of peril has been created, with respect to which a tort action would lie without having recourse to the contract itself. Machinery has been set in motion and life or property is in danger. It avails not that the operator pleads that he simply failed to sound the whistle as he approached the crossing. The hand that would spare cannot by stayed with impunity on the theory that mere nonfeasance is involved. In such cases, in the words of the Tuttle case, we have a "breach of duty distinct from a contract." Hart, *supra at 564-65.*

Therefore, Defendant Creative Maintenance, having undertaken its duties to remove snow and ice but having failed to do so, is subject to liability to the injured Plaintiff.

This distinction was also reviewed in Sherman v. Sea Ray Boats, Inc., 251 Mich. App 41; 649 NW2d 783 (2002). In Sherman, *supra,* Plaintiff filed a *tort* action against Defendants arising out of their failure to warn, caution and instruct as to the structural decay of a boat. The court held that Plaintiff's tort action arose out of the *specific contract executed between the two parties as to the merchantability of the boat.* The Michigan Court of Appeals held that since Plaintiff's cause of action arose pursuant to the breach of contractual obligations, she must allege misfeasance on the part of the Defendants to recover in tort. Sherman, *supra at 52.* Again, both parties had entered into a valid contract whose breach afforded the Plaintiff a breach of contract remedy only.

Misfeasance and nonfeasance have been further addressed by our courts:

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> "There are, it is recognized, cases in which an incident of nonfeasance occurs in the course of an undertaking assumed. Thus a surgeon fails to sterilize his instruments, an engineer fails to shut off steam, Kelly v. Metropolitan R. Co. [1895] 1 QB 944 (72 LT 551), a builder fails to fill a ditch in a public way, Eillis v. McNughton, 76 Mich 237 (15 Am St Rep 308). These are all, it is true, failures to act, each disastrous detail, in itself, a "mere" nonfeasance. But the significant similarity relates not to the slippery distinction between action and non-action but to the fundamental concept of 'duty'; in each situation of peril has been created, with respect to which a tort action would lie without having recourse to the contract itself. Machinery has been set in motion and life or property is endangered. It avails not that the operator pleads that he simply failed to sound the whistle as he approached the crossing. The hand that would spare cannot be stayed with impunity on the theory that mere nonfeasance was involved. In such cases in the words of the Tuttle case, *supra*, we have a 'breach of duty distinct from contract'. Or, as Prosser puts it (Handbook of the Law of Torts[1st ed] Section 33, p 205) ' if a relation exists which would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise not." Freeman-Darling, Inc. v. Andries-Storen Reyaert Multi Group, Inc., 147 Mich. App 282; 382 NW2d 769 (1985), citing Hart, at 286.

Courtright v. Design Irrigation, Inc., 210 Mich. App 528; 534 NW2d 181 (1995), discusses this doctrine. At issue in Courtright was whether evidence presented created a triable issue of fact regarding Defendant's liability in tort for breach of duty arising out of a breach of a contractual provision with the Co-Defendant premises owner. The Court found that there was sufficient evidence to show that Defendant, Design Irrigation, breached a duty of ordinary care to third parties. In so holding, the court found that Design Irrigation "clearly undertook to perform the service of draining the sprinkler system for the property owner. This maintenance work was deemed necessary for the protection of the tenants and their property. Courtright looked to the Restatement of Torts in finding liability to a third party for Defendant's failure to exercise reasonable care by failing to complete its responsibilities under a contract.

In the case at bar, the Plaintiff's cause of action does not arise out of her contractual relationship with the Defendants, but rather out of the common law

duty of a contracting party to perform services with ordinary care for the benefit of third parties. In Rinaldo and Hart, the Supreme Court noted that each plaintiff had an option to bring an action based on either tort or breach of contract theories. In both cases, the Plaintiff's tort cases were dismissed as they arose directly from a breach of contract, between contracting parties, leaving Plaintiff with a viable breach of contract action. In a situation involving injury to a non-contracting third party, however, Michigan case law has recognized a duty owed to third parties regardless of the misfeasance versus nonfeasance distinction.

B. DERBABIAN V MARINER'S POINTE IS ENTIRELY DISTINGUISHABLE FROM THE CASE AT BAR AND THE COURT OF APPEALS WAS CORRECT IN REJECTING DEFENDANT'S ARGUMENT

At the trial, undisputed evidence was admitted regarding the 18-hour snow storm, Defendant's notice thereof, and Defendant's negligence. This evidence, previously cited in Plaintiff's Counter-Statement of Facts and below, are entirely different from and distinguishable from the facts in Derbabian v Mariner's Pointe, attached to Defendant's Application as Exhibit E. In Derbabian, supra, the decision, on its face, is rendered based on the very specific facts of that case, which are obviously different and distinguishable from the facts of the case at bar.

In the case at bar, it is undisputed that a winter storm warning was issued the day prior to Plaintiff Sandra Fultz falling in this parking lot, that the snow fell for 18 continuous hours from approximately 6:00 p.m. on December 6, 1994 to approximately 1:00 p.m. on December 7, 1994 and the snow stopped falling about 9 hours before the Plaintiff fell. [Apx 19b-20b, 26b, Gross, pp 106-07, 119]

All the witnesses agreed that the entire lot was covered with ice and was slippery. [Apx 68a-70a, McCabe, pp 62, 63, 65; Apx 79a, Coon, p 165; Apx 14b-15b, 17b, Coon, pp 176-78, and 181; Apx 217a-218a, 221a, O. Fultz, pp 74, 75, and 94]

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David Sherman, the owner of Defendant-Appellant Creative Maintenance, Ltd., admitted that he was on notice, the day before Plaintiff-Appellee's slip and fall, that it was going to snow. [Apx 159a, Sherman, p 158] Defendant-Appellant's sworn Answers to Interrogatories, confirmed that it was "Creative Maintenance's obligation to plow this parking lot when the snow exceeded 1-½ inches and to apply salt after each plow" and this was confirmed at trial. (Apx 6b, Interrogatory No. 16] **Mr. Sherman acknowledged that Defendant-Appellant did not salt any portion of the parking lot in which the Plaintiff-Appellee fell, either the day before or the day of Plaintiff's Appellee's fall, even though he was at the premises during the snowfall.** [Apx 169a-170a, 173a, Sherman, pp 178-79, 186] Mr. Sherman also testified that he returned to this parking lot between 7:00pm and 7:30pm on December 7, 1994 (5 to 8 hours after it stopped snowing and 1 to 4 hours prior to Plaintiff-Appellee's slip and fall) and further "recalled" plowing the lot for a second time just prior to Plaintiff-Appellee's fall. [Apx 204a, Sherman, p 48] Although Plaintiffs-Appellees presented counter-evidence at the time of trial that Defendant-Appellant had never returned to the parking lot, if Defendant-Appellant did return to the parking lot, he would have seen the abominable, icy conditions described by all other witnesses. The fact that Mr. Sherman alleges that he plowed the parking lot at that time, certainly allows for the conclusion that he actively and negligently plowed. Defendant-Appellant further admitted that he did not salt at any time allowing for the uncontroverted finding of negligence. [Apz 169a-170a, 173a, Sherman, pp 178-79, 186]

In severe contrast to the facts in the case at bar, the Plaintiff in Derbabian, supra, slipped and fell eight days after the most recent snowfall. In the interim eight-day period after the snow stopped and before the Plaintiff fell, the evidence demonstrated that the Defendant, over the course of four days, applied eight tons

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of salt. There was no evidence in Derbabian, supra, that the Defendant negligently plowed or salted and there was no evidence that the Defendant knew or should have known of the icy condition in this parking lot. Id. At 698-99, 706-07, 709. The Derbabian Court, in finding no duty, heavily emphasized that there was no evidence that the Defendant had notice of the condition of the parking lot and no evidence nor even an allegation that Defendant negligently plowed or salted after the last snowfall. Derbabian, *supra* at 706-07, 709. Also, in light of the fact that the snow removal contractor had no notice of the alleged condition and had not been to the lot for a few days, Derbabian found that the person in the best position to prevent injury to the Plaintiff was the land owner, and not the snow removal company. In the case at bar, the Defendant was on the scene, had actual notice of the snow and ice and obviously was the person in the best position to reduce the danger and prevent Plaintiff's injury.

Also, the Plaintiff in Derbabian alleged a premises liability theory against the Defendant snow removal contractor but the Court found that Defendant did not possess or control the parking lot and therefore could not maintain a premises liability action.

In the case at bar, the Defendant had a duty to use reasonable care under the common law, apart from any theory of premises liability, as established by decades of Michigan case law following the Second Restatement of Torts,

In addition, the Derbabian court specifically distinguished the facts and circumstances of that case from the very cases upon which the Plaintiff in the case at bar relies. (See Derbabian, at pp. 707-08, expressly distinguishing the facts in Derbabian from Osman v Summer Green Lawn Care, Inc., 209 Mich App 703; 532 NW2d 186 (1995), Courtright v Design Irrigation, Inc., 210 Mich App 528; 534 NW2d 181 (1995), Clark v Dalman, 379 Mich 251; 150 NW2d (1967) and Auto-

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Owners Insurance Co. v Michigan Mutal Insurance Company, 223 Mich App 205; 565 NW2d 907 (1997).

In summary, the Defendant would have the Court believe that the Derbabian decision provides immunity to all snow removal contractors. On the contrary, a plain reading of the Derbabian decision reveals that it is based on the specific facts of that case alone and the decision specifically distinguishes those facts from other decisions of the Court of Appeals upon which the Plaintiff in the case at bar relied both at the trial level and in the Court of Appeals.

C. Defendant Creative Maintenance, Ltd. is guilty of misfeasance while undertaking its duty of snow removal on December 7, 1994.

In the event that the Court determines that misfeasance is a necessary element in maintaining a claim on behalf of the Plaintiff, it is Plaintiff's position that Defendant is in fact guilty of misfeasance in this instance. Although the line between misfeasance and nonfeasance is often blurred in the various examples provides in the case law heretofore cited, the distinction appears to be based on whether the Defendant commenced any work at all.

> "The distinction between misfeasance and nonfeasance is somewhat difficult to make. Courtright, *supra* at 530, Hart, *supra* at 564.
>
> "Misfeasance is negligence during performance of a contract. While performing a contract, a party owes a separate general duty to perform with due care so as not to injure another. Breach of this duty may give rise to tort liability. Clark v. Dalman, 379 Mich 251, 261, 150 N.W.2d 755 (1967)." Courtright at 530.

In Courtright, the Defendant actually began performance of the work under the contract but failed to complete it. The Courtright court relying on the Second Restatement of Torts, *supra,* determined that in the event the Defendant actually began the work but negligently failed to complete it establishes "misfeasance" and therefore actionable tortious conduct. Courtright at 531-32.

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In Hart v. Ludwig, *supra*, the Supreme Court elaborated on the distinction between misfeasance and nonfeasance as follows:

> The distinction is this: If a party undertake to perform work, and proceed on the employment, he makes himself liable for any misfeasance in the course of that work; but if he undertakes, and does not proceed on the work, no (tort) action will lie against him for nonfeasance." Hart, *supra* at 562.

In addition, where a defendant failed to remove ice and snow from a walkway of a business, as required by contract, the Michigan Court of Appeals found that the Defendant had undertaken to remove the snow and that its failure to do so could be deemed a failure to exercise due care. Talucci v Archambault, 20 Mich App 153, 160-61, 173 N.W.2d 740 (1969). Plaintiff in Freeman-Darling, Inc. v. Andries-Storen Reyaert Multi Group, Inc., *supra*, the Court found that the distinction between misfeasance and nonfeasance does not relate to the slippery distinction between action and non-action but to the fundamental concept of "duty." The examples of misfeasance cited in Freeman include incidents of nonfeasance which occurred in the course of an undertaking assumed including a surgeon who fails to sterilize his instruments, an engineer who fails to shut off steam, and a builder who fails to fill a ditch in a public way. Again, the distinction between misfeasance and nonfeasance appears to be distinguished in the Michigan Case Law between those actions and inactions which occur after the undertaking is assumed (misfeasance) and complete failure to begin the undertaking at all (nonfeasance).

In the case at bar, the Defendant Creative Maintenance had a contractual duty to plow the snow in this particular lot and salt after each plow. Defendant Creative Maintenance had a common law duty to exercise ordinary care in the performance of those contractual duties on the morning

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of December 7, 1994. The evidence is that Defendant Creative Maintenance did go to this parking lot on December 7, 1994 and plow the parking lot but did not put any salt down whatsoever. The evidence also reveals that Defendant Creative Maintenance left this lot while it was still snowing. The evidence reveals that it continued to snow for approximately five (5) hours after Defendant left this lot. There was conflicting evidence on whether the Defendant ever returned to this lot prior to the Plaintiff's slip and fall at 10:00 p.m. The Defendant testified that he returned to the lot at approximately 7:30 p.m., 2 ½ hours before Plaintiff fell, and would have plowed the lot clean at that time making it easy to walk and push shopping carts through the parking lot, contrary to all other evidence that the Defendant never in fact returned to this lot [Apx 204a-205a, Sherman, pp48-49]

In light of the fact that the lot was covered with ice and was, by all witness accounts, a complete mess when Plaintiff fell, the Defendant clearly is guilty of misfeasance in that he undertook his contractual duty to plow this parking lot and to salt it but completely failed to reduce the hazard of the ice and snow. Because the Defendant actually undertook the task of attempting to reduce the hazard of ice and snow and failed to adequately plow and failed to salt, he is guilty of misfeasance as established by Michigan Case Law.

ARGUMENT III

The Open and Obvious Doctrine applies to premises liability Defendants only, and in the alternative the Open and Obvious Doctrine does not apply in this case because the hazardous condition was effectively unavoidable.

Standard of Review

Claims of instructional error are review de novo. Tobin v. Providence Hospital, 244 Mich App 626; 624 N.W. 2d. 548 (2001); a reviewing Court must

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examine the jury instruction as a whole to determine whether there is error requiring reversal. Cox v Board of Hospital Managers for the City of Flint, 467 Mich 1, 651 N.W.2d 356 The instructions should include all of the elements of the Plaintiff's claims and should not omit material issues, defenses, or theories of the evidence supporting them. Instructions should not be extracted piecemeal to establish error. Even if somewhat imperfect, the instructions do not create error requiring reversal if, on balance, the theories of the parties and applicable law are adequately and fairly presented to the jury. *A reviewing Court will only reverse for instructional error where failure to do so would be inconsistent with substantial justice.* Tobin v. Providence Hospital, 244 Mich App 626; 624 N.W. 2d. 548 (2001); Case v. Consumer Powers Company, 463 Mich 1, 6; 615 N.W.2d 17 (2000); Johnson v. Corbet, 423 Mich 304, 327; 377 N.W.2d 713 (1985); MCR 2.613 (A) [Emphasis added]

However, a Trial Court may be entitled to some level of deference under the abuse of discretion standard of review if the decision to give or withhold certain jury instructions depends on a factual determination. Hilgendorf v. St. John Hospital, 245 Mich App 670; 630 N.W.2d 356 (2001)

Argument

The Open and Obvious Doctrine applies to premises liability Defendants only and should not be expanded to non-premises liability Defendants against whom the burden of proof is different. The Open and Obvious Doctrine , even if available to the Defendant in this case, is not applicable here because the condition was unavoidable.

In the case at bar, the Plaintiff was a business invitee injured when she slipped and fell on the ice-covered parking lot owned and controlled by Comm-Co Equities. Premises liability is conditioned on possession and control of the property. Merritt v. Nickelson, 407 Mich. 544, 522; 287 NW2d 178 (1980).

A possessor/invitor has a duty to take reasonable measures within a

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reasonable time after an accumulation of snow and ice to diminish the hazard of injury to an invitee. Orel v. Uni-Rak Sales Company, Inc., 454 Mich 564, 567; 563 NW2d 241 (1997); Anderson v. Wiegand, 223 Mich. App 549, 553-554; 567 NW2d 452 (1997); Quinlivan v. Great Atlantic and Pacific Tea, 395 Mich 244, 261; 235 NW2d 732 (1976); SJI 2nd 19.05. This duty of the possessor, and therefore Plaintiff's burden of proof, is different than that of a "third party" defendant.

The Open and Obvious Doctrine has consistently been applied as a defense in premises liability actions on behalf of the person or entity who *possesses or controls* the premises. [See Bertrand v. Allen Ford Inc., 449 Mich. 606; 537 NW2d 185 (1995) and Lugo v. Ameritech Corporation, Inc., 464 Mich. 512; 629 NW2d 384 (2001)]. See Gratopp v. Lumbermans Mutual Casualty Company, unpublished per curiam opinion of the Court of Appeals, holding that the Open and Obvious defense is not available to a snow removal contractor. (**Exhibit D**) In the case at bar, Court of Appeals upheld the verdict in favor of the Plaintiff and held that the Open and Obvious Doctrine did not apply to the circumstances of this case.

The Defendant is requesting that the Michigan Supreme Court expand the interpretation of the Open and Obvious Doctrine and defenses available to land owners to apply to contractors.

Creative Maintenance, Ltd. would argue that they owe no duty of care toward the injured Plaintiff since they did not own or control the property on which she was injured. Defendant also argues, however, that despite the absence of ownership and possession, it should be afforded the general defenses (specifically, the Open and Obvious Doctrine) available to property owners.

The case at bar, however, involves allegations of breach of duty to exercise reasonable care against a snow removal contractor. The Open and Obvious Doctrine does not apply because the Plaintiff did not assert or attempt to prove at

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trial that the Defendant possessed or controlled the parking lot.

If this Court gives credence to the Defendant's proposal that only misfeasance provides grounds for an actionable negligence claim against a non-contracting, non-premises liability Defendant, then the burden of proof against such a Defendant would obviously be higher than the burden of proof against the premises liability land owner. As such, successful claims against the non-premises liability Defendant will be fewer, contrary to the representations of the Defendant. If the non-premises liability Defendant would also have the protection of the Open and Obvious Doctrine, heretofore available only to a premises liability Defendant, then the high burden of proof coupled with the Open and Obvious Doctrine essentially would spell the death knell for any claims against the non-premises liability Defendant, contrary to long established common law in Michigan.

In the case at bar, Defendant Creative Maintenance, Ltd. was on the premises and actively pursuing snow removal. Defendant Creative Maintenance was the party in absolutely the best position to diminish the hazard of ice and snow and prevent the Plaintiff's injury. Leaving the premises while it was still snowing and without applying any salt whatsoever does not put the premises owner in a better position to reduce the hazard of ice and snow. Such an argument, frequently made by the Defendant throughout its brief, lacks common sense. The premises owner, along with the invitees and tenants, rely on the snow removal company to reduce the risk of harm in this parking lot. By leaving the parking lot on the date in question without using ordinary care to perform the very function it was hired to perform, does not put the possessor of the property in a better position to prevent injury to plaintiff. On the contrary, by not adequately plowing the snow while it was on the premises and by failing to salt the premises where the conditions called for such simple action, the Defendant Creative Maintenance, Ltd.

allowed the dangerous condition of snow and ice to not only continue but to increase and build without deterrence, thus causing Plaintiff's injuries. There is no reasonable basis to allow this Defendant, against whom it is suggested there should be a higher burden of proof, to also hide behind the cloak of the Open and Obvious Doctrine.

Interestingly, where lack of possession or control is argued by the Defendant regarding the issue of duty, the Defendant argues that it may have possessed or controlled this parking lot for the purposes of enjoying the defense of the Open and Obvious Doctrine.

> "With regularity, the concept of a possessor of property "loaning" its possession or control to another party has found expression in Michigan Premises Liability Law. See example e.g. Orel v. Uni-Rak Sales, 454 Mich 564, 563 N.W.2d 241 (1997) (Where Plaintiff's employer, its employees, sub-contractors and suppliers completely took over fenced parking lot while construction was under way, issue of fact on possession, relying on Meritt v. Nickelson, 407 Mich 544, 552-53, 287 N.W.2d 178 (1980)) "So to the extent that a snow-removal contractor has contractually assumed a piece of the land owner or possessor's responsibilities, and has potentially become exposed to suits by 3rd party invitees for conditions on the land, it is logical that the snow removal contractor should be entitled to avail itself of the defenses commonly associated with, and asserted by, premises owners and possessors." (p. 35 of Defendant's Brief on Appeal)

Obviously, the Defendant cannot have its cake and eat it too. Either the Defendant possessed and controlled the lot and would be able to avail itself of the protection of the Open and Obvious Doctrine, which of course would make it subject to premises liability theories, or it did not possess and control the lot, thus creating a higher burden of proof but no Open and Obvious defense.

Notwithstanding the Defendant's misplaced reliance on these defenses in general, Defendant's argument regarding the application of the Open and Obvious Doctrine to this case is unsupported by case law.

In Lugo, *supra*, the Court considered various circumstances where the Open

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and Obvious Doctrine would not apply. The Court indicated that there are "special aspects" of open and obvious conditions which would prevail in imposing liability upon the Defendant in a premises liability case. Lugo, *supra at pp. 517-18*.

> "An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable.
>
> * * *
>
> In sum, only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided **will serve to remove that condition from the open and obvious danger doctrine.**" Lugo at 518-19 [Emphasis added]

The Court also emphasized that "our conclusion regarding the special aspects of an open and obvious condition that are required in order to **remove such a condition from the scope of the Open and Obvious Doctrine** is not mere 'dicta'." Lugo, *fn. 3, p. 519*.

The Michigan Court of Appeals expanded on the "special aspects" theory in Chretien v. Lakeshore Motel, 201 WL 733203, unpublished, (2001) Ct of Appeals Docket No. 221593. **(EXHIBIT E)** In Chretien, the Michigan Court of Appeals held:

> "That evidence presented showed that the walkways around the Defendant's premises were icy. Plaintiff chose to walk on the grass which, although similarly icy, appeared safer than the walkway. If Plaintiff's only choice is to encounter the icy condition on the property, be they on the sidewalk or the grass, or turn around and leave because there is no safe place to walk, the open and obvious nature of the danger created by the icy grass does not insulate the Defendants from liability because the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee." Chretien, at p. 2, citing Bertrand v. Allen Ford, Inc., 454 Mich 564, 567; 563 NW2d 185 (1985).

The Lugo Court specifically envisioned liability for the case at bar when considering the term "special aspect". The Court found that if an open and obvious hazard exists at the only exit of the commercial building, and leaving the building

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would require an invitee to encounter the risk of harm without any alternative, though the condition may be considered "open and obvious", its unavoidability made it an unreasonable risk and therefore "removed the condition from the Open and Obvious Doctrine. Lugo, *supra at 517-518*; Brousseau v. Daykin Electric Corporation, 2002 WL 1275500 (2002 Ct of Appeals Docket No. 225880) (**Exhibit F)** Stated in another way, despite an otherwise "open and obvious" condition on the property, *a premises owner* remains liable for injuries if that condition is otherwise unavoidable. Where the risk is unavoidable, the "Open and Obvious Doctrine" does not apply. Lugo, *supra at 517-518*.

It was uncontroverted at trial that the Plaintiff confronted an unavoidably dangerous condition. The parking lot was completely covered with ice and if the Plaintiff wished to drive home that evening, it was necessary for her to cross the ice-covered parking lot to get to her car and go home.

Under these circumstances, the Michigan Supreme Court has already determined that the Open and Obvious Doctrine does not apply. [See also Bertrand v. Allen Ford Inc., 449 Mich 606, 610-11; 537 NW2d 185 (1985), LaRue v. Richard E. Jacobs Group, CA 211741, unpublished, 1999, and Lindsay v. Klrf Management, CA 211701, unpublished 1999.] **(Exhibits G & H)**

In addition, the Special Jury Instruction proposed by the Defendants at trial did not accurately state the law regarding the Open and Obvious Doctrine. Although counsel for Defendant Creative Maintenance, Ltd. did not prepare a written proposal for such an instruction, he represented, albeit in chambers, that he would rely on Co-Defendants proposed jury instruction with modifications to include Defendant Creative Maintenance, Ltd. The proposed jury instruction on this issue, in its entirety, is as follows:

> "Defendant...is not liable to Sandra Fultz where the damages are known to Sandra Fultz or are so obvious and apparent that

Sandra Fultz may be reasonably be expected the danger." [Apx 12b]

Defendant Comm-Co Equities, with approval of Co-Defendant Creative Maintenance, suggested that the following questions and answer be included on the jury verdict form regarding the open and obvious issue:

"Question No. 1: At or before the time of the occurrence was the condition of the parking lot open and obvious to Plaintiff Sandra Fultz?

Answer: _____ (Yes or No)

If your answer is "yes," do not answer any further questions at this time. [Apx 13b]

Nowhere in the proposed jury instruction did Defendant include the "special circumstances" aspect of the Doctrine and the instruction, as well as the proposed verdict form, inadequately state the law to the point of misrepresentation.

Therefore, Defendant has presented no compelling argument to expand the Open and Obvious Doctrine, and even if the doctrine was expanded as suggested by the Defendant, the Supreme Court has already concluded that the doctrine does not apply to circumstances such as those presented in the case at bar. Finally, the jury instruction proposed by Defendants did not accurately state the law, contrary to MCR 2.516.

ARGUMENT IV

Comparative Negligence of Plaintiff

A. Standard of Review

Claims of instructional error are reviewed de novo. Tobin v. Providence Hospital, 244 Mich App 626; 624 N.W. 2d. 548 (2001); a reviewing Court must examine the jury instruction as a whole to determine whether there is error requiring reversal. Cox v Board of Hospital Managers for the City of Flint, 467 Mich 1, 651 N.W.2d 356. The instructions should include all of the elements of

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the Plaintiff's claims and should not omit material issues, defenses, or theories of the evidence supporting them. Instructions should not be extracted piecemeal to establish error. Even if somewhat imperfect, the instructions do not create error requiring reversal if, on balance, the theories of the parties and applicable law are adequately and fairly presented to the jury. *A reviewing Court will only reverse for instructional error where failure to do so would be inconsistent with substantial justice.* Tobin v. Providence Hospital, 244 Mich App 626; 624 N.W. 2d. 548 (2001); Case v. Consumer Powers Company, 463 Mich 1, 6; 615 N.W.2d 17 (2000); Johnson v. Corbet, 423 Mich 304, 327; 377 N.W.2d 713 (1985); MCR 2.613 (A) [Emphasis added]

However, a Trial Court may be entitled to some level of deference under the abuse of discretion standard of review if the decision to give or withhold certain jury instructions depends on a factual determination. Hilgendorf v. St. John Hospital, 245 Mich App 670; 630 N.W.2d 356 (2001)

B. The trial court was correct in refusing to consider comparative Negligence on the part of the Plaintiff

Pursuant to MCR 2.516(D)(2), pertinent portions of the Michigan Standard Jury Instructions must be given if they accurately state the applicable law, and they are requested by a party. In addition, there must be **SUFFICIENT EVIDENCE** presented by a party to warrant the giving of an instruction. Wincher v. Detroit, 144 Mich. App 448, 456; 376 NW2d 125 (1985), lv. den., 424 Mich 872 (1986) (Emphasis Added). Determining whether a jury instruction is applicable is within the discretion of the trial court. In the case at bar, the trial court determined that the issue of comparative negligence was not applicable. Therefore, the jury instruction was not given.

In an effort to establish "evidence" of comparative negligence, the Defendant argues that the Plaintiff had an "alternative" path available to her to get

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to her car. This representation by the Creative Maintenance, Ltd. is disingenuous. Both the Plaintiff and her co-worker, Kim Coon, testified that there was no alternative but to walk on to the ice covered parking lot to get to their vehicles. What Defendant is suggesting, however, is rather than taking the exact path which Plaintiff took on that evening -- stepping into the parking lot immediately upon walking out the door of Farmer Jack and proceeding across the parking lot on a diagonal, and shortest, path to her vehicle -- the Plaintiff could have exited Farmer Jack and turned left to walk down the sidewalk in front of the store before stepping onto the ice covered parking lot and proceeding to her vehicle. Defendant's "alternative" path is completely irrelevant and in fact is not an "alternative path" whatsoever.

Under Defendant's "theory," Plaintiff would still have to walk across the ice covered parking lot and still would have to confront the area where she ultimately fell, which was in the aisle way immediately behind her vehicle. Therefore, the trial court and the Court of Appeals agreed that the Defendant failed to present any evidence, under such a scenario, as to Plaintiff's negligence.

Creative Maintenance, Ltd. also argues that Plaintiff's decision to carry four grocery bags, two in each hand, with handles, across the lot to her vehicle somehow amounts to negligent conduct on her part. Defendant's "theory", presumably that the weight of these bags played a role in Plaintiff's injury, is pure speculation.

The Defendant offered no evidence whatsoever that the grocery bags played any role in causing the Plaintiff to fall. The Plaintiff testified that she was carrying the bags to her side, they were not in front of her face, nor did they prevent her in any manner from seeing the ground. In fact, she was looking directly at the ground the moment before she slipped and fell on a ridge of ice. The Plaintiff also

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testified that she took extra precautions in walking out to her car because of the icy conditions, watched the ground very closely and took small steps.

Plaintiff also testified that she had just stepped over an icy ridge, one foot slipped to the right, she heard a pop and then she fell down. [Apx 88a, S. Fultz, p15]. Defendant was unable to solicit any testimony or present any evidence to support speculation that four plastic handled grocery bags made Plaintiff less stable than she would have been without the grocery bags. In fact, Plaintiff suggests that the small additional weight in each hand made Plaintiff more stable as she traversed this parking lot. [See History of Tightrope Walking, Flying Wallendas].

In an effort to bolster its speculation that the grocery bags contributed to Plaintiff's fall, Defendant suggests that the Plaintiff should have left her grocery bags at the door and traversed the parking lot without the bags, drive her car back to the store and load her bags, because that is what was done by co-worker, Kim Coon. When the facts are viewed more closely, however, Ms. Coon's actions are easily understood and distinguishable from the Plaintiff's actions. Kim Coon testified that she had "a lot of bags of groceries, enough to fill up her cart" that evening. She attempted to push her cart across the parking lot to her vehicle but could not get her basket to move because of the ridges of ice, and therefore had no choice but to leave her cart of groceries at the store. Ms. Coon advised the jury, however, that she would have walked across the lot with bags in hand if she only had four, as did the Plaintiff. [Apx 79a, Coon, p 166]

Plaintiff testified that she was aware that the parking lot was bad and that one could not push a cart across the lot, and simply took her four bags from her cart and proceeded across the lot. [Apx 87a-88a, S. Fultz, pp13-15].

Defendant also suggests Plaintiff saw Ms. Coon loading her groceries in her

vehicle before the Plaintiff had stepped out into the lot and, with such an observation, was obligated to follow the example set by Ms. Coon in leaving the groceries at the door. Plaintiff testified, however, that she exited the store, she saw a vehicle parked in front of the store but did not realize it was Ms. Coon or what she was doing until the Plaintiff had already started out across the parking lot. [Apx 99a, S. Fultz, p 37]. In any event, Ms. Coon tried to walk on the ice with her cart but the ridiculous condition of the lot prevented her from doing so, leaving her with not alternative but to leave her cart full of groceries at the door and confront the icy lot on foot.

Despite efforts to the contrary, Defendant/Appellant failed to present "sufficient evidence" to warrant giving the jury instruction on comparative negligence. Defendant/Appellant offered no evidence to suggest that the Plaintiff had an alternative, safe path to her vehicle, and offered no evidence to suggest that carrying four bags of groceries put Plaintiff off-balance. Plaintiff asserts that 100 out of 100 people, given Plaintiff's same circumstances, would have done exactly as Plaintiff did. Unfortunately, despite walking very carefully, the ridged ice caused Plaintiff to fall and suffer injury. Having failed to produce evidence supporting a theory of comparative negligence, the trial court correctly declined Defendant's request to so instruct the jury and the Court of Appeals correctly agreed. Defendant's appeal should be denied.

RELIEF REQUESTED

Plaintiff Sandra Fultz and Otto Fultz ask this Court to affirm the Judgment against Creative Maintenance, Ltd. because substantial justice requires such a finding.

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Respectfully Submitted,

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Dated: July 23, 2003

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STATE OF MICHIGAN

IN THE SUPREME COURT

SANDRA GAIL FULTZ AND
OTTO FULTZ,

Plaintiffs-Appellees,

vs

UNION-COMMERCE ASSOCIATES LIMITED PARTNERSHIP, COMM-CO EQUITIES, NAMER JONNA, ARKAN JONNA, LAITH JONNA, MOSHIN KOUZA, AND GLADYS KOUZA,

Defendants,

and

CREATIVE MAINTENANCE, LTD.,

Defendant-Appellant.
_____/

Supreme Court Docket No. 121613

Court of Appeals No. 224019

Lower Court Case No. 95-501433 NO
Oakland County Circuit Court

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PROOF OF SERVICE

Kimberly Riccobono, hereby states that on July 23, 2003, she did serve a copy of: PLAINTIFFS'/APPELLEES' BRIEF ON APPEAL, ORAL ARGUMENT REQUESTED AND A COPY OF THIS PROOF OF SERVICE upon:

NOREEN L. SLANK, ESQ. P31964
Attorney for Defendant-Appellant
4000 Town Center, Suite 909
Southfield, MI 48075

by depositing said documents in a sealed envelope as aforesaid in a U.S. Mail depository with full, first class postage pre-paid thereon.

I declare the statements are true to the best of my information, knowledge and belief.

Kimberly Riccobono

Subscribed and sworn to before me
this 23rd Day of July, 2003.

Janice M. Kinney Notary Public
For the County of Oakland, MI
My Commission Expires: 07/29/06

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EXHIBIT A

STATE OF MICHIGAN

COURT OF APPEALS

DEWITT BUILDING COMPANY, INC.,

Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
June 12, 2003

No. 235536
Oakland Circuit Court
LC No. 98-008070-CZ

DEWITT BUILDING COMPANY, INC.,

Plaintiff-Appellee,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant.

No. 236945
Oakland Circuit Court
LC No. 98-008070-CZ

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Following a jury trial, in Docket No. 235536, plaintiff appeals as of right from an order granting defendant's motion for partial directed verdict. In Docket No. 236945, defendant appeals as of right from a judgment in plaintiff's favor. We affirm.

Plaintiff's only argument on appeal is that the trial court improperly granted defendant's motion for directed verdict on the issue of consequential damages. We disagree. The trial court's decision on a motion for a directed verdict is reviewed de novo. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779, (2002). A directed verdict is appropriate only when no factual question exists upon which reasonable jurors could differ. *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679-680; 645 NW2d 287 (2001). The appellate court reviews all the evidence presented up to the time of the motion, considers it in a light most favorable to the nonmoving party, and determines whether a question of fact existed. *Id.* at 679.

Plaintiff specifically argues that sufficient evidence was presented for a rational jury to conclude that defendant's failure to pay on an Employment Dishonesty Coverage (EDC) policy caused consequential damages that arose naturally from the failure to pay or that such damages were reasonably within the contemplation of the parties at the time they entered the contract. Consequential damages, including lost profits, are recoverable for a breach of a commercial contract when those damages arise naturally from the breach or can reasonably be said to have been in contemplation of the parties at the time they entered the contract. *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 13; 516 NW2d 43 (1994). "Application of this principle in the commercial contract situation generally results in a limitation of damages to the monetary value of the contract had the breaching party fully performed under it." *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414-415; 295 NW2d 50 (1980).

Plaintiff claims its consequential damages arose naturally from defendant's breach because defendant knew that the failure to pay on the EDC policy would result in bad publicity causing a loss of profits, attorney fees, and damages to its reputation. However, plaintiff failed to establish that the failure to pay an EDC policy claim ordinarily results in bad publicity. No testimony was presented to establish that the breach of an EDC policy would, in the usual course of events, result in bad publicity. Moreover, plaintiff failed to demonstrate that the parties contemplated consequential damages at the time the EDC policy was issued. Plaintiff's owner admitted that he only became concerned about bad publicity well after the policy was issued. Therefore, the trial court properly granted defendant's motion for directed verdict on the issue because plaintiff failed to establish that consequential damages arose naturally from defendant's breach or that the parties contemplated such consequential damages at the time the EDC policy was issued.

Defendant argues on appeal that the trial court erred in denying its motion for partial summary disposition because the EDC policy excludes coverage for indirect losses. We disagree. A trial court's grant or denial of a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition is proper when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When deciding a motion for summary disposition, a court must consider the documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

"Exclusions limit the scope of coverage provided and are to be read with the insuring agreement and independently of every other exclusion." *State Farm Mut Auto Ins Co v Roe (On Rehearing)*, 226 Mich App 258, 263; 573 NW2d 628 (1997). Exclusions are strictly construed in favor of the insured. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 333; 632 NW2d 525 (2001). "If an insurer intends to exclude coverage under certain circumstances, it should clearly state those circumstances in the section of its policy entitled 'Exclusions.'" *Fragner v American Community Mut Ins Co*, 199 Mich App 537, 540; 502 NW2d 350 (1993). Exclusions that are clear and specific must be enforced. *Group Ins Co v Czopek*, 440 Mich 590, 597; 489 NW2d 444 (1992).

The EDC policy provides, in relevant part:

> A. General Exclusions: We will not pay for loss as specified below:

3. Indirect loss: Loss that is an indirect result of any act or "occurrence" covered by this insurance including, but not limited to, loss resulting from:

a. Your inability to realize income that you would have realized had there been no loss of, or loss from damage to, Covered property.

b. Payment of damages of any type for which you are legally liable. But, we will pay compensatory damages arising directly from a loss covered under this insurance.

c. Payment of costs, fees or other expenses you incur in establishing either the existence or the amount of loss under this insurance.

4. Legal Expenses: Expenses related to any legal action.

While defendant is correct that the EDC policy excludes loss from an "indirect result of any act or 'occurrence' covered by this insurance," the EDC policy does not exclude damages resulting from a failure to pay a claim. An insurer must clearly state policy exclusions. *Fragner, supra.* Here, the EDC policy does not contain an exclusion for indirect damages resulting from the insurer's failure to pay claims, therefore, it does not exclude those losses. See *id.*

Moreover, Michigan case law recognizes that a "claim for lost profits is separate from the claims to enforce the insurance contract." *Lawrence, supra* at 11, quoting *Salamey v Aetna Cas & Surety Co*, 741 F2d 874, 877 (CA 6, 1984). The exclusion in the EDC policy operates only if plaintiff attempts to enforce an insurance contract. Here, plaintiff is claiming lost profits from a breach of the EDC policy and not under a claim to enforce it. Therefore, the trial court properly denied defendant's motion for summary disposition because there was a genuine issue as to whether plaintiff incurred indirect losses from defendant's failure to pay under the EDC policy.

Defendant next argues that the trial court improperly denied its motions for partial summary disposition, directed verdict, JNOV, and new trial because Burton Gorelick (Gorelick) was not an employee under the EDC policy. We disagree. Summary disposition is proper when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Cacevic (On Remand), supra.* In reviewing the decision on a motion for JNOV, this Court must view the testimony and all legitimate inferences from it in the light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). Whether to grant new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001).

An insurance policy is a contractual agreement between the parties. *Meridian Mut Ins Co v Wypij*, 226 Mich App 276, 279; 573 NW2d 320 (1997). Under section C of the EDC policy, an "employee" is defined and excludes "independent contractors." However, "independent contractor" is not defined in the policy. Defendant claims that Gorelick was an independent contractor and, thus, was excluded under the EDC policy. Generally, if an insurance policy uses the term 'employee' but does not define it, a court may determine whether a person was an employee or an independent contractor by use of the economic reality test. *Id.* at 279-280. Here, the definition of "employee" is not helpful in determining Gorelick's employment status, therefore, the economic reality test is helpful in making such determination.

Factors relevant to the economic reality test include: (1) control of the worker's duties; (2) payment of wages; (3) the right to hire, fire, and discipline; (4) performance of the duties toward the accomplishment of a common goal; (5) whether the worker provides his own equipment and materials; and (6) whether the worker holds himself out to the public as ready and able to perform certain tasks. *Id.* at 280-282. The totality of the circumstances must be considered, and no single factor controls. *Id.* at 280. Defendant's argument focuses on the method in which Gorelick was paid and his tax status. Defendant maintains that because Gorelick filed an IRS Form 1099, which identified him as a "non-employee," and because Gorelick's corporation, Century Construction, Limited, received Gorelick's commissions, Gorelick is necessarily an independent contractor.

However, even accepting that Gorelick filed an IRS Form 1099 and that Gorelick received payment by commission, the "totality of the circumstances must be considered, and no single factor controls." *Id.* In response to defendant's motion for partial summary disposition, plaintiff submitted evidence of Gorelick's "employee" status, including his own statement, an affidavit from insurance agent, John Williamson, that indicated that plaintiff's salespeople were employees, and a letter from Williamson to defendant indicating that Gorelick was plaintiff's employee because Michigan law did not permit him to be an independent contractor. Considering that each party provided evidence of different factors relevant to the economic reality test, there was a genuine issue of material fact regarding Gorelick's employment status and the trial court properly determined that defendant was not entitled to partial summary disposition on that basis.

At trial, plaintiff's owner, Robert DeWitt, testified that he had control of Gorelick's duties and had the right to hire, fire, and discipline Gorelick. DeWitt supervised Gorelick, and Gorelick was directly accountable to DeWitt. Gorelick was expected to report to DeWitt's office on weekday mornings. DeWitt often gave instructions to plaintiff's salespeople that had to be followed, and had disciplinary power. While the manner in which Gorelick was paid favors his status as an independent contractor, plaintiff presented evidence regarding other economic reality factors that weighed in its favor. Viewing all of the evidence in a light most favorable to plaintiff, reasonable jurors could honestly have reached different conclusions on the issue whether Gorelick was an employee or independent contractor. Therefore, the trial court properly denied defendant's motions for partial directed verdict, JNOV, and new trial. See *Central Cartage Co, supra.*

Defendant next argues the trial court erred in denying its motions for JNOV and new trial because there was no evidence that Gorelick committed dishonest acts. We disagree. The EDC policy provided, in relevant part:

a. "Employee Dishonesty" in paragraph A.2, means only dishonest acts committed by an "employee", whether identified or not, acting alone or in collusion with other persons, except you or a partner, with the manifest intent to:

(1) Cause you to sustain loss; and also

(2) Obtain financial benefit (other than employee benefits earned in the normal course of employment, including: salaries, commissions, fees, bonuses, promotions, awards, profit sharing or pensions) for:

(a) The "employee"; or

(b) any person or organization intended by the "employee" to receive that benefit. [Emphasis in original.]

Here, there was evidence that Gorelick committed dishonest acts under the EDC policy, including DeWitt's testimony that Gorelick defrauded several customers and personally accepted checks from the customers. Further, even if Gorelick acted in collusion with his corporation, Century, a rational jury could conclude that Gorelick would benefit from checks made payable to Century. Therefore, the trial court properly denied defendant's motions for JNOV or new trial because the evidence supported the jury's finding that Gorelick committed a dishonest act while intending to benefit himself or Century through fraud.

Defendant next argues that the trial court abused its discretion in denying defendant's motion for new trial based on excessive and unsupported damages. We disagree. Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *Kelly, supra.* If the verdict was within the range of the evidence, a new trial is not merited. *Means v Jowa Security Services*, 176 Mich App 466, 477; 440 NW2d 23 (1989). The burden is on the moving party to show that the verdict was excessive. *Belin v Jax Kar Wash No 5, Inc*, 95 Mich App 415, 423; 291 NW2d 61 (1980).

The jury found defendant liable to plaintiff for $64,026.03 in "actual damages" which, under the EDC policy, constituted plaintiff's "compensatory damages arising directly from a loss covered under this insurance." Defendant does not dispute that $26,500 of plaintiff's damages were proper. There was evidence, however, of other "compensatory damages arising directly from a loss covered under this insurance," including $27,168.66 plaintiff paid for the completion of four projects without a return on its performance. Evidence also indicated that plaintiff paid Gorelick $2,700 for work that was to be done on three houses and that Gorelick took plaintiff's building materials valued at $7,690.65. Therefore, evidence indicated that plaintiff's "compensatory damages arising directly from a loss covered under this insurance" totaled $64,059.31 and defendant's motion for a new trial based on excessive or unsupported damages was properly denied. See *Means, supra.* Moreover, the jury's award fell reasonably within the range of the evidence and the limits of what reasonable minds would deem just compensation; accordingly, defendant's motion for remittitur was also properly denied.

Defendant next argues that the trial court abused its discretion in refusing to instruct the jury on agency law. We disagree. "The determination whether the supplemental instructions are applicable and accurate is within the trial court's discretion." *Stoddard v Manufacturers Nat'l*

Bank of Grand Rapids, 234 Mich App 140, 162; 593 NW2d 630 (1999). "[T]he trial court is obligated to give additional instructions when requested, if the supplemental instructions properly inform the jury of the applicable law and are supported by the evidence." *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 402; 628 NW2d 86 (2001).

Here, defendant requested that the trial court instruct the jury as follows:

> The law with respect to independent insurance agents, is that they are the agent of the insured and not the insurance company. As a result, knowledge and/or disclosure by an insured to the insured's agent does not constitute disclosure or knowledge to the insurance company. Because the independent insurance agent is the agent of the insured, any statements made or materials prepared by the agent are the representative statement of the insured and are an admission by the insured.

The trial court did not abuse its discretion in refusing to give this supplemental jury instruction because the instruction was misleading. First, Williamson's status as an agent presented, at least, a question of fact. See *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 20-21; 592 NW2d 379 (1998) (an independent insurance agent is an agent of the insured is the ordinary, but not exclusive, conclusion). Second, not all statements made or materials prepared by the agent are the representative statements of the insured or are considered admissions of the insured. "It is hornbook learning that because one is an agent for one purpose he is not an agent for all." *Sherman v Korff*, 353 Mich 387, 397; 91 NW2d 485 (1958). Therefore, the trial court did not abuse its discretion in refusing to render defendant's supplemental instruction on agency.

Next, defendant argues that the trial court erred in refusing to admit an alleged party admission made by DeWitt to a client, which was contained in the client's deposition testimony from another proceeding. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). A party admission is not hearsay. See MRE 801(d)(2)(A). However, deposition testimony is not excluded as hearsay if the declarant is unavailable as a witness. See MRE 804(b)(5). Here, there was no showing that the client was "unavailable" under MRE 804(a) or 804(b)(5); therefore, the deposition testimony was properly denied admission into evidence.

Finally, defendant argues that the trial court improperly admitted hearsay evidence on the issue of plaintiff's damages. Specifically, defendant argues that plaintiff's accountant was permitted to testify regarding the contents of two documentary exhibits without having personal knowledge of the particular items that were claimed to have been stolen from job sites. The trial court overruled defense counsel's hearsay objection, finding the exhibits admissible under the hearsay exception for records of regularly conducted activity, MRE 803(6). "The business records exception to the hearsay rule provides that reports or records kept in the course of a regularly conducted business activity are not to be excluded as hearsay unless the source of information or method or circumstances of preparation indicate a lack of trustworthiness." *Price v Long Realty, Inc*, 199 Mich App 461, 467; 502 NW2d 337 (1993).

The trial court did not abuse its discretion in permitting the introduction of exhibits containing plaintiff's itemized damages because the source of information or method or circumstances of preparation did not indicate a lack of trustworthiness. The exhibits containing plaintiff's itemized damages were prepared from previous exhibits that had already been admitted as records of regularly conducted activity. The compilation of business records in preparation for trial is permissible under MRE 803(6). Regarding defendant's specific concerns over the missing job materials, plaintiff's accountant testified that there was no indication in plaintiff's records that materials from Gorelick's jobs were transferred to another job. The absence of records of the materials supports an inference that the materials were no longer in plaintiff's possession. See MRE 803(7). In particular, the materials were paid for by plaintiff, missing after Gorelick defrauded the four customers, and, according to plaintiff's records, the materials were not recaptured. Further, plaintiff's accountant testified regarding plaintiff's accounting method, which the trial court accepted as trustworthy. Therefore, the trial court did not abuse its discretion in admitting plaintiff's list of itemized damages.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra

EXHIBIT B

STATE OF MICHIGAN

COURT OF APPEALS

TYRON SCOTT,

Plaintiff-Appellant,

v

PYRATECH SECURITY SYSTEMS, INC.,

Defendant-Appellee.

UNPUBLISHED
October 22, 2002

No. 231657
Wayne Circuit Court
LC No. 99-937703-NO

Before: Murphy, P.J., and Markey and R. S. Gribbs*, JJ.

PER CURIUM.

Plaintiff appeals by right from a circuit court order granting defendant's motion for summary disposition. We reverse and remand.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson,* 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co,* 460 Mich 446, 455; 597 NW2d 28 (1999).

Defendant contracted to provide security services at the store where plaintiff worked. Every contract is accompanied by a common-law duty to perform with ordinary care the things agreed to be done. *Osman v Summer Green Lawn Care, Inc,* 209 Mich App 703, 707-708; 532 NW2d 186 (1995), overruled on other grounds by *Smith, supra* at 455 n 2. Those foreseeably injured by the negligent performance of a contractual undertaking are owed a duty of care. *Id.* Pursuant to the contract at issue, defendant agreed to provide security service at the store and to exercise "[r]easonable care . . . in the performance of" the contract. The contract did not specify what the provision of security service entailed. Apparently the specifics of the security guard's duties were covered by a separate document (post orders), which outlined some general rules for

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

the guard to follow. However, the post orders did not indicate that they were comprehensive or exclusive and there is nothing to indicate that the store could not direct the guard to perform other tasks reasonably related to the provision of security services. There was an issue of fact whether defendant negligently performed its contractual duties in this case when the guard failed to count people who entered the store near closing and reported in error that everyone had left the premises.

Reversed and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ Roman S. Gribbs

EXHIBIT C

Court of Appeals of Michigan.
Sean **MCBRIDE**, Plaintiff-Appellee,
v.
PINKERTON'S, INC., d/b/a **PINKERTON** SECURITY & INVESTIGATION SERVICES,
Defendant-Cross-Plaintiff-Appellee,
and
PM ONE, LTD., d/b/a PM DIVERSIFIED, Defendant-Cross-Defendant-Appellant,
and
METROPOLITAN REALTY CORP., Defendant.
Sean **MCBRIDE**, Plaintiff-Appellee/Cross-Appellant,
v.
PINKERTON'S, INC., d/b/a **PINKERTON** SECURITY & INVESTIGATION SERVICES,
Defendant-Cross-Plaintiff-Appellant/Cross-Appellee,
and
PM ONE, LTD., d/b/a PM DIVERSIFIED, Defendant-Cross-Defendant-Appellee/Cross-Appellee,
and
METROPOLITAN REALTY CORP., Defendant-Appellee/Cross-Appellee.
No. 202147, 202204.
July 2, 1999.

Before: YOUNG, P.J., and MURPHY and HOEKSTRA, JJ.

PER CURIAM.

*1 In these consolidated appeals, defendant Pinkerton Security and Investigation Services ("Pinkerton") appeals as of right from a jury verdict in favor of plaintiff for ten million dollars plus interest and costs. Plaintiff cross-appeals as of right from an order of the trial court granting summary disposition in favor of PM One Ltd. ("PM") and Metropolitan Reality Corporation ("Metro"). PM appeals as of right from an order of the trial court granting summary disposition in favor of Pinkerton on Pinkerton's indemnification claim. We affirm in part, reverse in part, and remand.

Plaintiff filed this negligence case against defendant Pinkerton, the company that contracted to provide security at Wellington Place Apartments ("Wellington Place"), PM, the property management company of Wellington Place, and Metro, the owner of the property. As will be discussed herein, at the time that Pinkerton contracted to provide security services at Wellington Place, PM was serving as the court-appointed receiver of the property, while Metro was the mortgagee and Wellington Place Apartments, Inc., was the owner of title. However, following the termination of the redemption period associated with the receivership proceedings, title to Wellington Place passed to Metro, after which PM contracted with Metro to provide management services for the property.

Although the facts underlying this case were largely disputed at trial, we have been able to glean the following from the evidence presented by the parties. In January 1994, plaintiff decided to move out of his father's house and secure his own place to live. In researching rental communities, plaintiff learned of Wellington Place from a rental community magazine. Attracted to Wellington Place, plaintiff scheduled an appointment to speak with a leasing agent about renting an apartment. Plaintiff met with Savilla Major, a leasing agent at Wellington Place, who spoke to plaintiff about the

apartments. According to plaintiff, Major informed him that Wellington Place provided the "extra added feature" of an on-site security guard to maintain security on the premises: Wellington Place is located at 59 Seward Avenue in a part of Detroit that was characterized at trial as a "high-crime" area. Major also explained to plaintiff that all visitors at Wellington Place were required to sign in before entering the building, and that visitors were not allowed to enter the building unless they entered via the "Centrex" intercom system. The Centrex system required visitors to call the tenant in the building who they were there to see, and then the tenant could "buzz" that visitor through the permanently locked entrance to the building. Unauthorized visitors were denied access to the building first by the Centrex system and second by the security guard on duty. Enticed by, among other amenities, the security measures in place at Wellington Place, plaintiff decided to lease an apartment in the building.
*2 On January 27, 1994, just three weeks after he had moved into his apartment, plaintiff returned home from work and entered the apartment building. While plaintiff was retrieving his mail, he noticed an unusually large number of people loitering in the lobby of the building. As plaintiff walked through the lobby to his apartment, someone in the lobby verbally harassed plaintiff regarding his physical appearance. Specifically, this person asked plaintiff whether he was "a guy or a girl," and called plaintiff a "faggot" and a "gaybob." Plaintiff responded to these remarks by telling the person, "screw you or f--you." According to plaintiff, the Pinkerton security guard who was on duty that evening took no action in response to this exchange.
After plaintiff went inside his apartment, he changed from his work clothes and decided to purchase some items from a local convenience store. Plaintiff left his apartment and proceeded toward the entrance of the apartment building, and plaintiff's roommate shouted from the apartment for plaintiff to buy him some candy. When plaintiff responded to his roommate, someone in the lobby yelled "shut up." Plaintiff entered the lobby and attempted to ascertain who had told him to shut up, but was unsuccessful. Plaintiff then walked to the convenience store, made his purchases, and returned to the apartment building. However, as plaintiff walked through the lobby, he was again the target of derogatory remarks from people loitering in the lobby. This time plaintiff was called, among other names, a "fag," a "bitch," a "whore," and a "sissy." According to plaintiff, not only did the Pinkerton security guard take no action in response to these remarks, but she actually laughed along with others in the lobby when the remarks were made. Plaintiff ignored the remarks and entered his apartment. Once again, however, plaintiff needed to leave his apartment to purchase an item at the convenience store. Plaintiff walked through the lobby of the building, and he noticed that the same group of people were still loitering in the lobby. Plaintiff left the building without incident, made his purchases from the store, and returned to Wellington Place, but when he tried to reenter the building he discovered that three of the men who were harassing him inside the building were now standing in the doorway to the building, blocking his entrance. Plaintiff and these men engaged in a brief verbal exchange, in which plaintiff claims that he asked the men to move, when one of the men suddenly shot plaintiff, rendering him paraplegic. According to plaintiff, the Pinkerton security guard was standing on the other side of the doorway and observed the entire verbal exchange as well as the shooting.
At trial, plaintiff presented evidence that this was not the first instance of criminal activity at Wellington Place, nor was this the first time that a Pinkerton security guard on duty had apparently neglected his duties. Jacqueline Dunn-Bell resided at Wellington Place from 1992 until May 1994, at which time she moved out because she was "terrified" of living in the building. Dunn-Bell testified that she had been robbed at gunpoint on two occasions, and that, on at least three occasions, she had received visitors to her ninth-floor apartment who had not signed in or been buzzed in via the Centrex system, but had nonetheless managed to bypass the Pinkerton security guard on duty in the lobby. Dunn-Bell brought these events to the attention of both Wellington Place management and Pinkerton management. Dunn-Bell also testified that on numerous occasions, she personally witnessed Pinkerton security guards socializing with guests, watching television, and otherwise not performing security functions that she thought were expected of them.
*3 Robin Prentice, a resident manager at Wellington Place, testified that sometime before plaintiff was shot, she had met with Mike Curtis, a supervisor at Pinkerton, regarding the poor performance of

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the Pinkerton security guards assigned to Wellington Place. Specifically, Prentice testified that she informed Curtis that Pinkerton security guards were sleeping on the job, not signing visitors in as required, and were allowing visitors to bypass the Centrex system. Prentice testified that, following her meeting with Curtis, the problems about which she complained continued. In light of poor performance of the Pinkerton security guards assigned to Wellington Place, Prentice indicated that she was concerned for the safety of the resident of the building.

There were several additional facts that were in dispute, which will be discussed later in this opinion.

I

We first address Pinkerton's argument that the trial court erred in denying its motion for a JNOV. We review a trial court's decision to grant or deny a JNOV for whether the evidence and all legitimate inferences arising from the evidence, when viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law. *Forge v. Smith*, 458 Mich. 198, 203- 204; 580 NW2d 876 (1998).

Pinkerton argues that the trial court erred in not granting its motion for a JNOV because Pinkerton did not owe plaintiff a duty to protect him from the assault that resulted in his injuries. The requisite elements of a negligence cause of action are that the defendant owed a legal duty to the plaintiff, that the defendant breached or violated the legal duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered. *Schultz v. Consumers Power Co*, 443 Mich. 445, 449; 506 NW2d 175 (1993). Whether a defendant owes a duty to a particular plaintiff is generally a question of law for the court to decide, *Schmidt v. Youngs*, 215 Mich.App 222, 224; 544 NW2d 743 (1996), after it examines "a wide variety of factors, including the relationship of the parties and the foreseeability and nature of the risk." *Schultz, supra* at 450. Whether the breach of a particular duty owed by a defendant was a proximate cause of a plaintiff's injury is generally a question of fact for the jury, unless it can be said that reasonable minds could not differ regarding the cause of the plaintiff's injury, in which case the court should decide the issue as a matter of law. *Dep't of Transportation v. Christensen*, 229 Mich.App 417, 424; 581 NW2d 807 (1998).

As a preliminary matter, it must be acknowledged that in the absence of some "special relationship" or circumstances, one party generally does not have a duty to aid or protect another person. *Williams v Cunningham Drug Stores, Inc*, 429 Mich. 495, 498-499; 418 NW2d 381 (1988). Some generally recognized special relationships include invitor-invitee, common carrier-passenger, innkeeper-guest, landlord-tenant, employer-employee, and doctor- patient/psychiatrist-patient. *Murdock v. Higgins*, 454 Mich. 46, 55 n 11; 559 NW2d 639 (1997). In this case, no special relationship existed between plaintiff and Pinkerton that would have given rise to a duty on the part of Pinkerton to act in a manner that would have prevented plaintiff's injuries.

*4 Further, despite plaintiff's arguments to the contrary, plaintiff is not a third-party beneficiary of the security contract between Pinkerton and PM. To be an intended third-party beneficiary, the promisor must have undertaken to do something to or for the benefit of the party asserting such status. *Rieth-Riley Construction Co Inc v Dep't of Transportation*, 136 Mich.App 425, 429- 430; 357 NW2d 62 (1984); MCL 600.1405; MSA 27A.1405. An objective test is used to determine the claiming party's status, and focuses upon the contract itself. *First Security Savings Bk v. Aitken*, 226 Mich.App 291, 307; 573 NW2d 307 (1997). Where the contract is intended to primarily benefit its signatories, the mere fact that a third person would be incidentally benefited does not entitle that person to its protection. *Alden State Bk v. Old Kent Bk--Grand Traverse*, 180 Mich.App 40, 44; 446 NW2d 599 (1989). In this case, the language of the security contract clearly states the parties to the contract did not intend to benefit any third party and that the parties contracted solely for their own benefit. The mere fact that plaintiff may have incidentally benefited from the contract does not give him rights as a third- party beneficiary.

However, even in the absence of a special relationship or a contractual relationship, Michigan courts have recognized a duty where a defendant voluntarily assumed a function that it was under no legal obligation to assume. See, e.g., *Blackwell v Citizens Ins Co of America*, 457 Mich. 662; 579 NW2d 889 (1998); *Smith v. Allendale Mutual Ins Co*, 410 Mich. 685; 303 NW2d 702 (1981); *Braun v. York*

Properties, Inc. 230 Mich.App 138; 583 NW2d 503 (1998); *Courtright v. Design Irrigation, Inc.* 210 Mich.App 528; 534 NW2d 181 (1995). This duty of care is expressed with regard to third parties in § 324A of the 2 Restatement of Torts, 2d, p 142, which provides:

One who undertakes, gratuitously or for consideration to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Our Supreme Court in *Smith, supra* at 705, acknowledged the viability of a theory of liability under § 324A. See also *Courtright,* supra at 531 ("[Section] 324A of the Second Restatement of Torts has been accepted as a correct statement of Michigan law.")

Relying on § 324A, plaintiff maintains that, pursuant to the security contract, Pinkerton assumed a duty to provide PM with security services, which Pinkerton should have recognized were designed for the protection of plaintiff and the other tenants of Wellington Place. We agree. Pinkerton does not dispute that it contracted with PM to provide a limited level of security at Wellington Place. Although broadly defined, the duties assumed by the Pinkerton security officers included the following: a duty to observe and notify their superiors or the police of reportable activity; a duty to ensure that guests sign in and out when coming and going from the apartment complex; a duty to ensure that the intercom procedure was followed, i.e., no guest should be allowed entry unless admitted by a tenant via the Centrex system; a duty not to socialize while working; and a duty to contact either Pinkerton dispatch, the apartment management, or the police if a situation developed that the security officer could not handle or otherwise could not decide what course of action to follow. We were able to discern these duties by examining the security contract between Pinkerton and PM, the post orders associated therewith, and the testimony of agents of both Pinkerton and PM.

*5 We conclude that the nature of Pinkerton's undertaking to provide security services at Wellington Place should have caused Pinkerton to recognize that the services were designed, at least in part, for the protection of the tenants of Wellington Place. Accordingly, we find, as a matter of law, that Pinkerton voluntarily assumed a duty to provide a limited level of security services for the protection of the tenants of the apartment complex, including plaintiff, and that this limited level of security encompassed the duties discussed above.

Further, it was disputed at trial whether Shawnaa Robinson, the Pinkerton security guard on duty on the night that plaintiff was injured, breached duties owed to plaintiff and the other tenants of Wellington Place. Robinson testified that when the assailants first began their verbal harassment of plaintiff, she warned them that they would have to leave the complex if they continued the harassment. She also testified that following the assailants' continued harassment of plaintiff, she actually ordered them to leave the facility. According to Robinson, it was then that the assailants proceeded to the entrance of the apartment complex and shot plaintiff, who was attempting to reenter the building. Robinson did not know how the assailants gained access to the apartment building, or whether they had signed in as required. Robinson presumed, however, that the assailants were in the lobby at the invitation of other tenants, yet she made no effort to confirm this during any of the instances of harassment.

One of the assailants, Mantu Judkins, disputed Robinson's testimony. Judkins testified that Robinson never asked the assailants to stop harassing plaintiff, nor did she ever ask them to leave the apartment building. According to Judkins, Robinson did not address the assailants in any manner while they loitered in the lobby and harassed plaintiff. Further, plaintiff testified that, rather than taking action against the assailants, Robinson actually laughed at the comments that the assailants directed at him.

Once a defendant's legal duty is established, whether a defendant has breached that duty is a question of fact for the jury to decide. *Bertrand v. Alan Ford, Inc.* 449 Mich. 606, 613; 537 NW2d 185 (1995). Given the dissimilar renditions of the facts and circumstances surrounding the conduct of Pinkerton's

agent, Robinson, on the night that plaintiff was injured, we believe that the question whether Pinkerton breached duties owed to plaintiff, as a tenant of Wellington Place, was properly submitted to the jury.

Further, as indicated above, in a negligence case, the determination of proximate cause is left to the trier of fact, unless reasonable minds could not differ regarding the proximate cause of a plaintiff's injuries, in which case the court should decide the issue as a matter of law. *Christensen, supra.* The question of proximate cause depends in part on foreseeability. Moning v. Alfono, 400 Mich. 425, 439; 254 NW2d 759 (1977); *Ross v. Glaser*, 220 Mich.App 183, 192; 559 NW2d 331 (1996). Proximate cause is that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred. *Ross, supra* at 193. It involves a determination that the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable. *Id.* In viewing the evidence in the light most favorable to plaintiff, we cannot say that reasonable minds could not have found that Pinkerton's alleged breaches of its voluntarily assumed duties proximately caused plaintiff's injuries.

*6 We are aware of this Court's recent decision in *Krass v. Tri-County Security, Inc*, 233 Mich.App 661; __ NW2d __ (1999). In *Krass*, an agent of a security company directed the plaintiff's decedent to park his car in a parking lot owned by a merchant who hired the security company to provide security for its property. When the plaintiff's decedent returned to his car the next morning, he was shot and killed on the merchant's property. The plaintiff's decedent filed suit against the security company, alleging, among other things, that the security company failed to properly protect plaintiff's decedent or to control the premises. The trial court granted summary disposition in favor of the security company, and this Court affirmed that decision, holding that a merchant (and, here, derivatively the security company that it hires) who voluntarily takes safety precautions against the general societal problem of crime (here, by hiring the security company to provide parking lot patrol and serve as a deterrent to crime) cannot be sued "on the theory that the safety precautions were less effective then they could or should have been." *Id.* at 684.

We find that this Court's decision in *Krass* does not require us to reach a different result in this case. The present case arises from a tenant's claims against his landlord and the security company that it hired, while the decision in *Krass* concerned a business invitee's suit against a merchant and the security company that it hired. In affirming the decision of the trial court, this Court in *Krass* primarily relied on our Supreme Court's decisions in *Williams, supra,* and the later case of *Scott v. Harper Recreation, Inc*, 444 Mich. 441, 448; 506 NW2d 857 (1993), both of which involved claims of a business invitee against a merchant. Importantly, however, our Supreme Court in *Scott, supra* at 452 n 15, expressly reserved its opinion regarding the application of the principles discussed in *Scott* to the area of landlord- tenant law, which is directly implicated in this case. Thus, *Krass* does not affect our analysis in this case.

Accordingly, the trial court did not err in denying Pinkerton's motion for a JNOV.

II

Pinkerton also argues that the trial court erred in admitting certain trial testimony. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski v. Xermac, Inc*, 457 Mich. 593, 613-614; 580 NW2d 817 (1998). When reviewing a court's decision to admit evidence, this Court will not assess the weight and value of the evidence, but will only determine whether the evidence was a kind properly considered by the jury. *Cole v. Eckstein*, 202 Mich.App 111, 113-114; 507 NW2d 792 (1993).

According to the challenged trial testimony, the individuals implicated in plaintiff's shooting had allegedly robbed a pizza delivery man and stole his car the day before the shooting in this case. After committing the crimes, the assailants sought refuge in the Wellington Place lobby. Plaintiff argued that the evidence was relevant because the Pinkerton security guard who was on duty on the night that plaintiff was injured was also working on the day of the robbery, yet she attested to the police officer investigating the shooting that she had never seen the assailants before. The trial court ruled that

plaintiff could elicit testimony about whether Pinkerton's agent had seen the assailants before the shooting, but could only elicit testimony about the robbery if plaintiff demonstrated that Pinkerton's agent knew of those crimes. At trial, however, plaintiff elicited testimony about the robbery from another resident, Otha White, without first making the required showing required by the trial court. Pinkerton objected and a bench conference occurred off the record, after which the trial court did not sustain the objection or instruct the jury to disregard the witness' statement about the crimes.

*7 Because we have previously determined that the trial court correctly decided that Pinkerton owed a duty of care to plaintiff, then the remaining issues that the jury had to decide was whether Pinkerton's agent was negligent in fulfilling her duties as a security guard and whether that negligence proximately caused plaintiff's injuries. In analyzing the negligence claim, the jury could have reasonably surmised that plaintiff had failed to show notice on the part of Pinkerton's agent because the testimony about the crimes was elicited only from another resident. Moreover, the evidence of a nonviolent robbery does not explicitly reveal an assailant's propensity to shoot people with whom he has confrontations. In sum, because the trial court was in the best position to judge the prejudicial effect of the evidence, we conclude that its decision to admit the testimony did not rise to a level constituting an abuse of discretion.

III

Pinkerton and PM next argue that the trial court erred in admitting expert testimony on calculating plaintiff's possible "hedonic" damages, which Michigan's standard jury instruction refers to as "damages for denial of social pleasure and enjoyment." See SJI2d 50.02. Neither party argues against an award of damages for denial of social pleasures and enjoyment, an award long recognized in Michigan, see, e.g., *Beath v. Rapid R Co.* 119 Mich. 512; 78 NW 537 (1899); rather, the parties only contest plaintiff's use of an expert witness to explain such damages to the jury.

Although PM and Pinkerton argue that we should review de novo the trial court's decision to admit the expert testimony, we disagree. A trial court's decision to admit expert testimony under MRE 702 or to exclude it as speculative is reviewed for an abuse of discretion. *Mulholland v. DEC Int'l Corp.* 432 Mich. 395, 402; 443 NW2d 340 (1989); *Phillips v. Deihm.* 213 Mich.App 389, 401; 541 NW2d 566 (1995). Further, in order to properly preserve an objection to the admissibility of evidence, the objecting party must object at trial and specify on appeal the same grounds for challenging the evidence that it did below. MRE 103(a)(1); *Meagher v. Wayne State Univ.* 222 Mich.App 700, 724; 565 NW2d 401 (1997).

The record reveals that, although Pinkerton stated during trial that hedonic damages are not authorized under Michigan law, a proposition that we have already indicated is without merit, *Beath, supra,* Pinkerton did not contend at trial that evidence concerning plaintiff's hedonic damages should not be presented to the jury via expert testimony. Rather, a review of the record reveals that plaintiff first raised this specific argument in its motion for a JNOV. Therefore, although we have serious doubts about the propriety of permitting evidence of hedonic damages by way of expert testimony, see *Kurncz v. Honda North America, Inc.* 166 FRD 386 (WD Mich. 1996), and cases cited therein, we decline to address this issue on appeal because the issue was not placed squarely within the lower court's discretion during trial.

IV

*8 Pinkerton also argues that that the trial court erred in denying its motion for a mistrial in the wake of the testimony of PM employee Savilla Major, who Pinkerton claims was a surprise witness. This court will not reverse the denial of a motion for a mistrial unless it is shown that the denial constituted an abuse of discretion. *Carbonnell v. Bluhm.* 114 Mich.App 216, 222; 318 NW2d 659 (1982).

In response to plaintiff's witness list, which contained 246 witnesses, Pinkerton states that it sent plaintiff interrogatories, asking him to specify which witnesses would be called, what the substance of their testimonies would be, and other related information. Plaintiff asserts that it objected to the interrogatory as unduly burdensome and overbroad. However, without waiving its objection, plaintiff informed Pinkerton that the information sought was unknown to him at that time. Pinkerton did not file a motion to compel discovery on this matter.

At trial, Major, the 113th witness on plaintiff's witness list, was called to testify by plaintiff. Major testified regarding the eviction of one of the assailants, Mantu Judkins, from the apartment complex for carrying a shotgun on the premises. She claimed that she informed various Pinkerton security guards as well as PM management about the incident and that she instructed the same that Judkins should be denied access to the apartment building because of threats that he had made. Following her testimony, Pinkerton moved for a mistrial. The trial court denied the motion, finding that Major, as a managerial employee of co-defendant PM, should have been known to Pinkerton in advance of her trial testimony. We cannot say that the trial court's reasons for denying a mistrial constituted an abuse of discretion.

In a related argument, Pinkerton argues that the trial court erred in denying its motion, in response to Major's testimony, to supplement its witness list with additional guards who worked in the apartment building during the time period surrounding the shooting. This Court reviews a decision whether to allow a party to supplement its witness list for an abuse of discretion. *Butt v. Giammariner*, 173 Mich.App 319, 321; 433 NW2d 360 (1988). The trial court denied Pinkerton's request, stating that "the only security guard relevant was the one that was there that night." Because Major conceded that she could not recall whether she ever spoke to the Pinkerton guard on duty at the time of plaintiff's shooting, we cannot say that the trial court abused its discretion in precluding Pinkerton from exploring the subject further.

V

Pinkerton also argues that because plaintiff had tested positive for the human immunodeficiency virus (HIV) in 1989, the trial court erred in not instructing the jury with the optional standard jury instruction in SJI2d 53.01, relating to plaintiffs who are not in ordinarily good health. This Court reviews claims of instructional error for abuse of discretion. *Stevens v. Veenstra*, 226 Mich.App 441, 443; 573 NW2d 341 (1997); *Joerger v. Gordon Food Service, Inc*, 224 Mich.App 167, 173; 568 NW2d 365 (1997).

*9 Before trial, Pinkerton argued that because plaintiff was HIV-positive, he should not be permitted to rely on the mortality table found at M.C.L. § 500.834; MSA 24.1834, nor SJI2d 53.01, the standard jury instruction employing the use of the table. Pinkerton based its argument on the optional sentence of the standard jury instruction that states, "This mortality table is to be considered by you in determining life expectancy only if you find that plaintiff was in ordinarily good health before sustaining the injuries complained of." The trial court, however, disagreed with Pinkerton and instructed the jury in accordance with the standard jury instruction, declining to read the optional sentence, reproduced above, and instead concluded with the optional sentence in the instruction concerning the conclusive nature of the mortality table, which provides:

These mortality figures are conclusive on the question of life expectancy, since no evidence has been presented to show that the Plaintiff has a probability of life greater or less than that indicated by the table.

We conclude that the trial court's instructions to the jury did not constitute an abuse of discretion. Neither party has pointed to any evidence admitted at trial that supports the view that plaintiff has a life expectancy less than that indicated in the mortality table, Further, at a post-trial hearing the trial court explained that plaintiff "could be HIV positive for the next eight years and then there could be a cure, and he continue to live another 53 years ." We believe that the trial court's reasoning is sound. Accordingly, the trial court did not abuse its discretion in giving the jury the conclusive form of the instruction.

VI

Pinkerton finally argues that the trial court was not permitted to award plaintiff pre-judgment interest on the entire jury award of ten million dollars. An award of interest, pursuant to M.C.L. § 600.6013; MSA 27 A.6013, is reviewed de novo on appeal. *Beach v State Farm Mut Automobile Ins Co*, 216 Mich.App 612, 623-624; 550 NW2d 580 (1996).

Entitlement to interest on a judgment is statutory and must be specifically authorized by statute. *Dep't of Transportation v. Schultz*, 201 Mich.App 605, 610; 506 NW2d 904 (1993). Interest on civil money

judgments is provided for in M.C.L. § 600.6013; MSA 27A.6013. This statute states in relevant part that "[f]or complaints filed on or after October 1, 1986, interest shall not be allowed on future damages from the date of filing the complaint to the date of entry of the judgment." Future damages are those arising from personal injury that accrue after the trier of fact makes its damage findings. M.C.L. § 600.6301(a); MSA 27A.6301(a).

Here, the jury awarded plaintiff a total damages award of ten million dollars. The parties stipulated to using a straight jury verdict form that did not require the jury to specify how much of its award was for past or future damages. The trial court further awarded pre-judgment interest on the entire amount awarded by the jury, which from the date plaintiff filed his complaint amounted to an additional interest award of $1,958,020. Pinkerton contends that the trial court erred in awarding pre-judgment interest on the entire jury award because plaintiff failed to show which portion of the jury's award was for future damages. We disagree.

***10** Pinkerton's argument placing the burden of proof upon plaintiff is without merit because M.C.L. § 600.6013; MSA 27A.6013 is remedial and should be liberally construed in favor of the prevailing party. See, e.g., *Denham v. Bedford*, 407 Mich. 517, 528; 287 NW2d 168 (1980); *Southfield Western, Inc v. Southfield*, 206 Mich.App 334, 339; 520 NW2d 721 (1994). Moreover, a prevailing party is entitled to statutory interest even if the order of judgment does not expressly provide for the interest. *Dep't of Treasury v Central Wayne Co Sanitation Auth*, 186 Mich.App 58, 64; 463 NW2d 120 (1990). Finally, because Pinkerton agreed to the use of a straight jury verdict form, which did not require the jury to allocate past and future damages, Pinkerton will not now be heard to complain that the trial court erred in awarding statutory interest on the entire jury award.

Accordingly, the trial court's interest award was not erroneously entered.

VII

We next address PM's argument that the trial court erred in granting summary disposition in favor of Pinkerton on Pinkerton's claim that PM was contractually bound to indemnify Pinkerton for any damages that it might be required to pay as a result of Pinkerton's negligence in providing security for the apartment complex. We disagree.

An indemnity contract is construed in the same fashion as are contracts generally. *Triple E Produce Corp v. Mastronardi Produce, Ltd*, 209 Mich.App 165, 172; 530 NW2d 772 (1995). Indemnity contracts should be construed to effectuate the intent of the parties, which may be determined by considering the language of the contract, the situation of the parties, and the circumstances surrounding the making of the contract. *Id.* A court should construe a contractual provision providing for indemnity strictly against the party who drafts the contract and the party who was the indemnitee. *Id.* Where the terms of a contract are clear and unambiguous, a court must enforce those terms as written, and their construction is for the court to determine as a matter of law. *Zurich Ins Co v. CCR & Co (On Rehearing)*, 226 Mich.App 599, 604; 576 NW2d 392 (1997).

It is undisputed that at the time that the security contract was executed, PM was serving as court-appointed receiver of Wellington Place Apartments. Pursuant to the terms of the receivership order, PM had the specific authority to execute contracts providing for the security of the property. The security contract provided, in pertinent part, as follows:

V. INSURANCE AND INDEMNIFICATION

* * *

b. It is understood and agreed between the parties that Pinkerton is not an insurer, and that the rates being paid for service is for a security officer, service designed to deter certain risks of loss, which rates are not related to the value of the personal or real property protected. All amounts being charged by Pinkerton are insufficient to guarantee that no loss will occur, and Pinkerton makes no guarantee, implied or otherwise, that no loss will occur or that the service supplied will avert or prevent occurrences or losses which the service is designed to help detect or avert. In no event shall Pinkerton liability exceed Two Thousand Five Hundred Dollars ($2,500.00). Client shall indemnify and hold Pinkerton harmless from any loss, claim, demand, liability, cause of action or judgment including but not limited to injury or death to persons or damage or loss of property whether or not well grounded

and whether and whether or not any negligence, misconduct or breach of duty by Pinkerton's agents, servants, employees or personnel is alleged to have contributed thereto, in whole or in part. Client's obligation to indemnify, defend and hold Pinkerton harmless shall be irrespective of whether Pinkerton or its agents, servants, employees or personnel is alleged to have been actively negligent, passively negligent, or any combination thereof. In addition, at its own expense, Client shall defend any such claim, demand, liability, cause of action or judgment which is asserted against Pinkerton. Client shall also reimburse Pinkerton for all legal expenses Pinkerton incurs in defending itself against any such claims which client fails to defend, together with any legal expenses Pinkerton incurs in enforcing any other [of] the terms, conditions, covenants or promises of this agreement.

* * *

**11* d. The entire agreement of the parties is expressed herein and no understandings, agreements, purchase orders, work orders or other documents shall modify the terms and conditions of this agreement. Pinkerton expressly limits acceptance to the terms and conditions herein which acceptance may be evidenced by either a representation of Client executing the Schedule of Security Services or by Client accepting the services performed by Pinkerton.

PM first argues that an examination of the "surrounding circumstances doctrine" precludes application of the indemnity provision against it. The surrounding circumstances doctrine provides that "if a contractual term is otherwise ambiguous or subject to more than one possible construction within the four corners of the written instrument and the circumstances or relations of the parties underlying the contract resolve that ambiguity, the Court must inquire into them in performing its interpretive function ." *Id.,* 607. However, our review of the indemnity clause reveals no ambiguity that would permit us, or the lower court, to look beyond the four corners of the contract. On the contrary, the language of the indemnity clause clearly and unambiguously imposes a duty upon the "Client" to indemnify and defend Pinkerton even if Pinkerton or its agents, servants, employees, or personnel are alleged to have been negligent.

Although PM concedes that its employee signed the security contract, PM argues that, as the court-appointed receiver of Wellington Place, it could not have been a party to the contract. We disagree. The contract was signed by George Brice, an employee of PM who served as a resident manager at Wellington Place while PM was acting as receiver of the property during foreclosure proceedings. Further, the record reveals that Brice was authorized to enter into the security contract by Elizabeth Lane, a property manager at PM. Although PM argues that its only role was that of a receiver in the foreclosure proceedings, PM's employee signed the contract under the term "Client" with the express authorization of a PM property manager. We conclude that PM is bound by the terms of the contract that it authorized its agent to sign.

PM also contends that operation of the statute of frauds, M.C.L. § 566 .132(1)(b); MSA 26.922(1)(b), should have prevented the trial court from enforcing the indemnity provision. Again, we disagree. MCL 566.132(1)(b); MSA 26.922(1)(b) provides, in relevant part, that a "promise to answer for the debt default, or misdoings of another person" is void unless the agreement is in writing and signed by the person to be charged with the agreement. Because we have already determined that PM, the party to be charged with the agreement, authorized its agent, Brice, to sign the written contract that provided Pinkerton with indemnity, we conclude that the contract complies with the statute of frauds.

PM also argues that the indemnity provision is unenforceable pursuant to M.C.L. § 691.991; MSA 26.1146(1), which provides:

**12* A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

Specifically, PM maintains that because Pinkerton conceded in the trial court that the security contract

at issue in this case constituted a contract concerning the "maintenance" of Wellington Place Apartments, the indemnity provision in the contract is void and unenforceable and is against public policy as expressed in M.C.L. § 691.991; MSA 26.1146(1).

First, we note that Pinkerton's acknowledgment in the court below that the security contract concerned an agreement for the "maintenance" of the apartment complex does not control our analysis of this issue because whether the contract at issue falls within M.C.L. § 691.991; MSA 26.1146(1) is a question of law. See *In re Ford Estate,* 206 Mich.App 705, 708; 522 NW2d 729 (1994) (the stipulation of parties do not bind an appellate court when a question of law is implicated).

Further, we disagree with PM's contention that the indemnity provision is void as a matter of public policy because it falls within the proscription of M.C.L. § 691.991; MSA 26.1146(1). The interpretation of a statute is a question of law, which we review de novo on appeal. *In re Schnell,* 214 Mich.App 304, 310; 543 NW2d 11 (1995). The primary goal of judicial interpretation of statutes is to ascertain the intent of the Legislature. *Id.,* 309. The first criterion in determining intent is the specific language of the statute. *Id.,* 310. The Legislature is presumed to have intended the meaning it plainly expressed, and when the language of a statute is clear and unambiguous, judicial construction is neither required nor permitted. *Id.* However, if a statute is ambiguous and reasonable minds can differ as to the meaning of the statute, judicial construction is permitted. *Id.,* 311.

We believe that the plain language of M.C.L. § 691.991; MSA 26.1146(1) reveals that when the Legislature determined to void certain contracts for indemnification relative to "the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith," it did not intend to void indemnification provisions in contracts that provide for building security. In our opinion, the plain language of M.C.L. § 691.991; MSA 26.1146(1) compels a conclusion that the Legislature sought to void only certain indemnification provisions in contracts relative to the construction and building industry, not the security industry. See *Peeples v. Detroit,* 99 Mich.App 285, 295; 297 NW2d 839 (1980) ("In the building and construction industry, public policy, as expressed by M.C.L. § 691.991; MSA 26.1146 (1), prohibits an indemnitee from recovering for his sole negligence."). Moreover, no Michigan court has applied M.C.L. § 691.991; MSA 26.1146(1) to void an agreement outside the context of the building and construction industry. Accordingly, we are not persuaded by PM's argument that M.C.L. § 691.991; MSA 26.1146(1) operates to void the indemnification provision in the present contract. The contract at issue in this case was for the provision of security services for Wellington Place Apartments and not "for the construction, alteration, repair or maintenance" of the facility.

**13* PM next argues that the provisions of the Michigan Consumers Protection Act (MCPA), M.C.L. § 445.901 *et seq.;* MSA 19.418(1) *et seq.,* operate to render the indemnification provision unenforceable. However, having found no evidence that the provisions of the MCPA were violated, we conclude that PM's claim under the MCPA is without merit.

PM finally argues that the indemnification provision is unenforceable for lack of "mutuality of obligation." In Michigan, the essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Detroit Trust Co v. Struggles,* 289 Mich. 595; 286 NW 844 (1939). Mutuality of obligation simply means that both parties are bound to an agreement or neither is bound. *Domas v. Rossi,* 52 Mich.App 311, 315; 217 NW2d 75 (1974). Here, the contract obligated Pinkerton to supply security services and PM to pay for such services. Both parties were bound to the agreement. PM's agreement to indemnify Pinkerton for losses resulting from Pinkerton's negligence in the performance of its contractual duties does not render the contract void for lack of mutuality of obligation. While indemnity clauses are construed strictly against the party who drafts the contract and the party who is the indemnitee, *Triple E Produce, supra,* such contractual provisions are nonetheless enforceable and not void for lack of mutuality of obligation.

Accordingly, we conclude that the trial court did not err in granting summary disposition in favor of Pinkerton on its indemnity claim against PM.

VIII

Plaintiff finally argues in his cross appeal that the trial court erred in granting summary disposition in favor of PM and Metro pursuant to MCR 2.116(C)(8) and (10) based on its finding that landlords are not responsible for third-party criminal acts. We agree. Accordingly, we reverse the decision of the lower court granting PM and Metro summary disposition.

We review de novo a trial court's decision on a motion for summary disposition. *Baker v. Arbor Drugs, Inc.* 215 Mich.App 198, 202; 544 NW2d 727 (1996). However, because the lower court presumably considered the parties' submitted documents that were outside the pleadings, we review this issue according to the standard for motions granted pursuant to MCR 2.116(C)(10). See *Shirilla v. Detroit,* 208 Mich.App 434, 436-437; 528 NW2d 763 (1995). A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Baker, supra.* We must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the party opposing the motion. *Id.* Our task is to review the record evidence, draw all reasonable inferences from it, and decide whether a genuine issue regarding any material fact exists to warrant a trial. *Id.*

Questions regarding duty are for the court to decide as a matter of law. *Scott, supra* at 448. Generally, a person does not have a duty to aid or protect another person endangered by a third person's conduct. *Williams, supra* at 498-499. However, an exception to this general rule exists when there is a special relationship between a plaintiff and a defendant. *Id.* at 499. The rationale underlying the recognition of a duty to protect in these special relationship situations is control, i.e., one person entrusts himself to the control and protection of another such that a duty to protect is imposed upon the person in control because that person is in the best position to provide a place of safety. *Id.* As previously noted, the landlord-tenant relationship is recognized under Michigan law as a "special relationship" upon which a duty to aid or protect may be premised. *Murdock, supra.*

**14* Although our Supreme Court has had occasion to address the scope of a duty to aid and protect in the context of cases where the defendant is a merchant and the plaintiff is an invitee, *Mason v. Royal Dequindre, Inc.* 455 Mich. 391; 566 NW2d 199 (1997); *Scott, supra; Williams, supra,* as previously indicated, the Court has reserved its opinion regarding the applicability of the principles discussed in those cases to the area of landlord-tenant law, *Scott, supra* n 15. However, this Court in *Holland v. Leidel,* 197 Mich.App 60, 62; 494 NW2d 772 (1992), stated, "[a] landlord has the duty to protect tenants from foreseeable criminal activities of third parties in the common area of the landlord's premises." Citing *Samson v Saginaw Professional Building, Inc.* 393 Mich. 393, 407-408; 224 NW2d 843 (1975); *Johnston v. Harris,* 387 Mich. 569, 198 NW2d 409 (1972); *Rodis v. Herman Kiefer Hosp.* 142 Mich.App 425, 428-429; 370 NW2d 18 (1985); *Aisner v. Lafayette Towers,* 129 Mich.App 642, 645; 341 NW2d 852 (1983).

In *Williams, supra* at 502 n 17, our Supreme Court noted the difference between a merchant-invitee relationship and that involving a landlord and his tenant.

We find that a landlord has more control in his relationship with his tenants than does a merchant in his relationship with his invitees. Should a dangerous condition exist in the common areas of a building which tenants must necessarily use, the tenants can voice their complaints to the landlord. Thus, in *Samson, supra* at 408-411, we upheld a landlord's duty to investigate and take available preventive measures when informed by his tenants that a possible dangerous condition exists in the common areas of the building, noting that the landlord's duty may be slight. The relationship between a merchant and invitee, however, is distinguishable because the merchant does not have the same degree of control. When the dangerous condition to be guarded against is crime in the surrounding neighborhood, as it is in the present case, the merchant may be the target as often as his invitees. Therefore, there is little the merchant can do to remedy the situation, short of closing his business.

Our Supreme Court's decision in *Samson, supra,* which is noted in *Williams* and cited by this Court in *Holland, supra,* presented a situation in which a defendant landlord leased space in its office building to a mental health clinic. The plaintiff was employed by an attorney who also maintained offices in the building. While using the elevator in the building, the plaintiff was assaulted by a knife-wielding patient of the mental health clinic who was also using the elevator. For some time before the assault,

other tenants of the defendant had complained about the use of the elevators and stairwells by patients of the clinic. To these tenants, the possibility of a patient committing a criminal act was foreseeable, though no prior criminal events involving clinic patients had occurred in the building. However, despite the concerns expressed by the other tenants, the defendant took no action to alleviate their uneasiness.

*15 Our Supreme Court held that although the defendant could not be liable for the act of leasing space to the mental health clinic, there were sufficient questions of fact regarding the defendant's conduct respecting the common areas of the facility to warrant a claim of negligence.

The common areas such as the halls, lobby, stairs, elevators, etc., are leased to no individual tenant and remain the responsibility of the landlord. It is his responsibility to insure that these areas are kept in good repair and reasonably safe for the use of his tenants and invitees.

The existence of this relationship between the defendant and its tenants and invitees placed a duty upon the landlord to protect them from unreasonable risk of harm. 2 Restatement Torts, 2d, § 314A (3).

The fact that such an event might occur in the future was foreseeable to this defendant. It had even been brought to its attention by other tenants in the building. The magnitude of the risk, that of a criminally insane person running amok within an office building filled with tenants and invitees, was substantial to say the least. To hold that, possessed of these facts and no other, this defendant should have inquired further into the reasonableness of its inaction, i.e., the probability of such an event occurring in the future, and that its failure to make an inquiry may be deemed negligence on its part, does not shock the conscience of this Court. [*Samson, supra* at 407-408.]

Notably, and crucial to our analysis in this case, the Court also held as follows:

Whether the care exercised was reasonable under the circumstances is for the jury to determine. [*Id.* at 407.]

We conclude that the analysis employed by our Supreme Court in *Samson* supports our conclusion that the trial court erred in granting summary disposition to PM and Metro on plaintiff's claim of negligence. Although a landlord is not an insurer of the safety of its tenants--nor do we believe it ever could be--a landlord is nonetheless obligated to see that the common areas are reasonably safe for the use of its tenants, *Samson, supra* at 407, an obligation that includes protecting tenants from the foreseeable criminal activities of third parties, *Holland, supra.*

We recognize, however, that in determining whether a duty exists, we must examine a variety of factors, including the relationship of the parties and the foreseeability and nature of the risk. *Schultz v. Consumers Power Co,* 443 Mich. 445, 450; 506 NW2d 175 (1993). "Most importantly, for a duty to arise there must exist a sufficient relationship between the plaintiff and the defendant." *Id.* We conclude that the existence of the landlord-tenant relationship in this case is sufficient to support the recognition of a duty on the part of PM and Metro to implement the specifically promised security measures in a non-negligent manner. Further, plaintiff's injuries in this case were not so unforeseeable as to relieve PM and Metro of this duty.

*16 Foreseeability ... depends upon whether or not a reasonable man could anticipate that a given event might occur under certain conditions. But the mere fact that an event may be foreseeable does not impose a duty upon the defendant to take some kind of action accordingly. The event which he perceives might occur must pose some sort of risk of injury to another person or his property before the actor may be required to act. [*Samson, supra* at 406.]

Even in cases involving claims by invitees against merchants, our Supreme Court and this Court have found that merchants are potentially liable for not protecting their identifiable invitees from the foreseeable criminal acts of third parties. *Mason, supra; Jackson v. White Castle System, Inc,* 205 Mich.App 137; 517 NW2d 286 (1994); *Green v. Shell Oil Co,* 181 Mich.App 439; 450 NW2d 50 (1989); *Diomedi v. Total Petroleum, Inc,* 181 Mich.App 789; 450 NW2d 91 (1989); *Mills v. White Castle System, Inc,* 167 Mich.App 202; 421 NW2d 631 (1988).

PM and Metro argue that the Pinkerton security guard could not have reasonably anticipated that a tenant would be shot outside the apartment building. In contrast, plaintiff argues that the verbal

exchanges inside the lobby did not render the crime so random and instantaneous that the Pinkerton security guard lacked notice to exercise reasonable care for the protection of plaintiff. Moreover, plaintiff argues that that PM and Metro had notice in the form of earlier complaints by tenants about loitering in and around the building and the failure to enforce the intercom system.

Under the circumstances of this case, we cannot say that plaintiff's injuries were unforeseeable. On at least two occasions, plaintiff, a tenant residing in the apartment building, was verbally harassed by nontenants who were loitering in the lobby. Although plaintiff himself testified that he was accustomed to such remarks, we do not believe that plaintiff's thick skin should act to relieve the Pinkerton security guard, and thus PM and Metro, of their duty to act reasonably to protect plaintiff from the criminal acts of those harassing him. The nature of the verbal harassment was both personal and offensive, and we do not find it unforeseeable that the verbal harassment ultimately escalated to a physical confrontation. Although we would not disagree that the specific nature of plaintiff's assault and injuries might not have been foreseen, i.e., that plaintiff would be shot multiple times and rendered paraplegic, the nature of plaintiff's injuries and the manner in which he received them nonetheless resulted from a reasonably foreseeable physical confrontation between plaintiff and his assailants. See *Babula v. Robertson*, 212 Mich.App 45, 53; 536 NW2d 834 (1995).

Accordingly, the trial court erred in granting summary disposition in favor of PM and Metro. Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

YOUNG, JR., P.J. (concurring).

*17 I concur only in the result reached by the lead opinion. I write separately regarding part I to explain the basis for my belief that Pinkerton owed a legal duty to plaintiff to perform its security services with reasonable care and that it was for the jury to determine whether that duty was breached under the facts of this case and whether such a breach proximately caused plaintiff's injury. I also write separately regarding part VIII to explain the basis for my belief that, in light of *Samson v Saginaw Professional Bldg, Inc*, 393 Mich. 393; 224 NW2d 843 (1975), the trial court erred in granting summary disposition to PM and Metro.

I

Regarding Pinkerton's tort liability, the lead opinion correctly states that this Court and our Supreme Court both have accepted § 324A of the Restatement of Torts, 2d as an accurate statement of Michigan law. See, e.g., *Blackwell v. Citizens Ins Co of America*, 457 Mich. 662; 579 NW2d 889 (1998); *Smith v. Allendale Mutual Ins Co*, 410 Mich. 685; 303 NW2d 702 (1981); *Courtright v. Design Irrigation, Inc*, 210 Mich.App 528; 534 NW2d 181 (1995). Indeed, § 324A appears to be based on the common-law rule "that accompanying every contract is a[ ] duty to perform with ordinary care the thing to be done, and that a negligent performance constitutes a tort as well as a breach of contract." *Clark v. Dalman*, 379 Mich. 251, 261; 150 NW2d 755 (1967); see also *Courtright, supra* at 530-531. In the third-party context, the rule has been stated as follows: "Those foreseeably injured by the negligent performance of a contractual undertaking are owed [ ] a duty of care." *Talucci v. Archambault*, 20 Mich.App 153, 161; 173 NW2d 740 (1969); see also *Tucker v. Sandlin*, 126 Mich.App 701, 704-705; 337 NW2d 637 (1983) (relying in part on § 324A to impose on the defendant a duty to third parties to perform security guard services with reasonable care). This common- law duty of care exists separately and apart from the contract. See *Talucci, supra; Osman v Summer Green Lawn Care, Inc*, 209 Mich.App 703, 707-708; 532 NW2d 186 (1995). Accordingly, on the basis of these authorities, I agree with the lead opinion that Pinkerton had a duty to exercise reasonable care in rendering the services to which it agreed in its security contract with PM. Relevant to this case was Pinkerton's contractual responsibility to prevent unauthorized access to the building. I further agree that it was for the jury to decide whether Pinkerton breached that duty and whether such a breach proximately caused plaintiff's injury. Therefore, the trial court properly denied Pinkerton's motion for judgment notwithstanding the verdict.

II

Turning to the liability of PM and Metro, the lead opinion states in part VIII:
Although a landlord is not an insurer of the safety of its tenants--nor do we believe it ever could be--a landlord is nonetheless obligated to see that the common areas are reasonably safe for the use of its tenants, *Samson* [*v Saginaw Professional Building, Inc,* 393 Mich. 393, 407; 224 NW2d 843 (1975),] an obligation that includes protecting tenants from the foreseeable criminal activities of third parties, *Holland* [*v Leidel,* 197 Mich.App 60; 494 NW2d 772 (1992).]
***18** I agree that our Supreme Court's decision in *Sampson, supra,* established a duty on the part of landlords to take reasonable measures to ensure that common areas are reasonably safe for tenants. Moreover, the duty recognized in *Samson* applies to the prevention of criminal assaults that present a foreseeable as well as unreasonable risk of harm. This is so even though the facts in *Samson* were somewhat unusual in that the danger of criminal assaults in that case was claimed to have been created by the fact that the landlord rented a portion of its premises to a state mental health clinic. Finally, and most important to my analysis of PM and Metro's potential liability in this case, the *Samson* Court stated that it preferred to leave it "to the jury to determine the ultimate questions which may impose liability, those of foreseeability, reasonableness and proximate cause." *Id.* at 409. Notwithstanding *Williams v Cunningham Drug Stores, Inc,* 429 Mich. 495; 418 NW2d 381 (1988), and *Scott v. Harper Recreation, Inc,* 444 Mich. 441; 506 NW2d 857 (1993), which decisions appear to be limited to the merchant- invitee context, I conclude that the principles of *Samson* control the basic duty owed by landlords to their tenants in this context. Indeed, the Supreme Court in *Williams, supra* at 502 n 17, described its *Samson* decision as upholding "a landlord's duty to investigate and take available preventive measures when informed by his tenants that a possible dangerous condition exists in the common areas of the building." Further, the Court in *Scott, supra* at 452 n 15, cautioned that it was reserving its opinion "regarding the application, in the area of landlord-tenant law, of the principles discussed in the present case." However, because I believe that the policy concerns recognized in *Williams* and *Scott* are equally applicable in the landlord- tenant context, I urge the Court to revisit *Samson* in light of those policies.
I further acknowledge that a panel of this Court in *Stanley v. Town Square Cooperative,* 203 Mich.App 143; 512 NW2d 51 (1993), purported to limit the duty recognized in *Samson.* The *Stanley* Court stated that a landlord's duty to exercise reasonable care "exists only when the landlord created a dangerous [physical] condition that enhances the likelihood of exposure to criminal assaults." *Id.* at 150; see also *Bryant v. Brannen,* 180 Mich.App 87, 97-98; 446 NW2d 847 (1989) (holding that a landlord may be liable only "to the extent that foreseeable criminal acts are facilitated by his failure to keep the physical premises under his control reasonably safe.") However, the panel in *Stanley* failed even to acknowledge the Supreme Court's decision in *Samson* (despite the fact that Judge Wahls cited *Samson* in his dissenting opinion in *Stanley*). It cannot be gainsaid that we are obligated to follow controlling Supreme Court precedent until the Supreme Court itself overrules that precedent. *Boyd v. W G Wade Shows,* 443 Mich. 525, 523; 505 NW2d 544 (1993). While *Stanley* 's proposition that a landlord's liability should be limited to physical defects in the premises has some appeal, our Supreme Court's decision in *Samson* clearly precludes such a holding.
***19** In this case, plaintiff submitted evidence in response to the motion for summary disposition that PM and Metro were made aware of prior criminal activity in the building and that tenants had raised various security issues concerning unauthorized access. Therefore, the remaining issue under *Samson* was whether the decision by PM and Metro to employ Pinkerton, a nationally renowned, licensed security guard service, was reasonable under the circumstances. Under *Samson,* this was a question for the jury to decide.

HOEKSTRA, J. (dissenting).
I respectfully dissent from section I of the lead opinion, which affirms the trial court's denial of the motion for a judgment notwithstanding the verdict by Pinkerton Security and Investigation Services ("Pinkerton"); and section VII, which reverses the trial court's grant of summary disposition to

defendant PM One Ltd. ("PM") and Metropolitan Realty Corporation ("Metro"). [FN1] I would hold that plaintiff proffered no basis upon which to conclude that Pinkerton owed him a duty of care. Accordingly, I would reverse the order of the lower court denying Pinkerton's motion for a judgment notwithstanding the verdict, affirm the trial court's order granting PM and Metro summary disposition, and find that the remaining issues are rendered moot.

> FN1. In light of my resolution of this issue in favor of PM, I have accepted the lower court's finding that PM was plaintiff's landlord, despite PM's argument that certain receivership proceedings precluded this finding. Like the lower court, I have nonetheless chosen to treat PM and Metro as one as plaintiff represents that they were represented by the same counsel and proffered the same legal arguments and motions.

My first and primary basis for dissenting is that I believe the foreseeability factor of the duty analysis required in this case is of more consequence than either the lead opinion or the concurring opinion acknowledges. It is well established that where there is no legal duty there can be no actionable negligence. *Blackwell v. Citizens Ins Co*, 457 Mich. 662, 667; 579 NW2d 889 (1998). Duty is the threshold element of any negligence action. *Id.* Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person. *Moning v. Alfono*, 400 Mich. 425, 439; 254 NW2d 759 (1977).

"In determining whether a duty exists, courts examine a wide variety of factors, including the relationship between the parties and the *foreseeability* and nature of the risk." *Schultz v. Consumers Power Co*, 443 Mich. 445, 450; 506 NW2d 175 (1993) (emphasis added). See also *Mason v. Royal Dequindre, Inc*, 455 Mich. 391; 566 NW2d 199 (1997). Foreseeability depends upon whether a reasonable person could anticipate that a given event might occur under certain conditions. *Schultz, supra* at 452, quoting *Samson v Saginaw Professional Bldg, Inc*, 393 Mich. 393, 406; 224 NW2d 843 (1975).

The questions of duty and proximate cause are interrelated because both depend in part on foreseeability--whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable. *Moning, supra.* Rather than going to the jury on the issues of breach of duty, proximate cause, and damages, this case should have been resolved in defendants' favor on the threshold question of duty because no reasonable person could have anticipated that this event might occur under these conditions.

***20** Plaintiff argues that the two to four verbal exchanges inside the lobby did not render the crime so random and instantaneous that Pinkerton's employee lacked notice to exercise reasonable care for the protection of the tenant, plaintiff. Moreover, plaintiff argues that Pinkerton had notice in the form of earlier complaints by tenants about loitering outside the building and failure to enforce the intercom system.

However, in my opinion, neither the assailants, Pinkerton's employee, nor Pinkerton could have known that these parties would come together in this place and time. Rather, this was a chance encounter that was unconnected to the events that preceded it in the lobby. Where the shooting occurred as one party was coming and others were leaving, the shooting constituted no more than an unfortunate, random act of violence for which Pinkerton should not be held legally responsible for failing to anticipate or prevent. Indeed, it was just as probable that this incident could have occurred had defendant's agent fulfilled her duties and directed the assailants to leave the premises at the precise time plaintiff was returning from his errand.

Additionally, I believe that this case should have been fully resolved in defendants' favor on the question of duty because the level of protection plaintiff sought to obtain was broader than the agreed-

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upon contractual obligations. Absent a specific promise to do so, a security contract does not ensure the personal safety of another. "A promise to take specific steps to reduce danger is a promise to do just that--not a promise to eliminate the danger." *Scott v. Harper Recreation, Inc.* 444 Mich. 441, 450; 506 NW2d 857 (1993).

To prevent the assault in this case would have required Pinkerton to provide a level of protection well beyond the scope of protection that Pinkerton contractually agreed to render for plaintiff's landlord. Within a contractually limited scope of risk, Pinkerton undertook to render only limited security services, including monitoring access to the common area, signing in guests, and observing the common area for reportable activities. These services cannot rationally be interpreted to include the level of protection required to prevent the random attack in this case. Indeed, to equate Pinkerton's obligations to that level of protection would be tantamount to holding that Pinkerton assumed the duty to guarantee plaintiff's safety at all times and in all places on the premises and grounds. Pinkerton's undertaking simply did not extend this far, and neither plaintiff's reliance upon Pinkerton nor Pinkerton's alleged failure to fulfill even those tasks it did assume can broaden the scope of Pinkerton's undertaking.

Mich.App.,1999.

McBride v. **Pinkerton's,** Inc.

1999 WL 33439548 (Mich.App.)

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EXHIBIT D

STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA S. GRATOPP and ROBERT GRATOPP,

Plaintiffs-Appellants,

and

LUMBERMENS MUTUAL CASUALTY COMPANY,

Intervening Plaintiff,

v

TANGER PROPERTIES LTD. PARTNERSHIP and HODGINS ASPHALT PAVING, INC.,

Defendants-Appellees.

UNPUBLISHED
February 28, 2003

No. 237663
Ogemaw Circuit Court
LC No. 00-653370-NO

Before: Kelly, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's orders granting defendants' motions for summary disposition. We affirm in part, and vacate and remand in part. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Cynthia Gratopp was employed at a store in a mall owned by Tanger Properties Limited Partnership. Hodgins Asphalt Paving, Inc., had entered into both a written contract with the mall to remove snow from the parking lot and to shovel and salt sidewalks and a verbal contract to clear snow from around dumpsters within twenty-four hours after plowing parking lots. On January 17, 1999 Cynthia Gratopp made several trips to her store's dumpster to dispose of trash. The mall's tenant handbook provided that trash was to be placed in dumpsters. The dumpster was located behind the mall, and was positioned on a curb. Plaintiff testified that although there was snow in front of the dumpster, she could walk up to the front of the dumpster and throw garbage in. She testified that at the sides and back of the dumpster the snow came out about a foot or two, was at least ankle deep, and was crusty and iced over. After Cynthia Gratopp disposed of the last load of trash she walked behind the dumpster to close the lid. As she did so she stepped on an accumulation of snow and ice, lost her footing, and fell to the ground, sustaining injuries.

Plaintiffs filed suit alleging that Cynthia Gratopp was on Tanger's property as a business invitee, that Tanger negligently failed to maintain the premises in a reasonably safe condition and to warn of the unsafe condition, and that Hodgins breached its contract with Tanger by failing to remove snow and ice from around the dumpster. Robert Gratopp alleged loss of consortium.

Defendants filed separate motions for summary disposition pursuant to MCR 2.116(C)(10). Hodgins argued that the snow behind the dumpster was a natural accumulation and was open and obvious, and that no genuine issue of fact existed as to whether it acted reasonably in performing its contractual duties. Tanger argued that the snow behind the dumpster was open and obvious, and that no special aspects of the condition made it unreasonably dangerous in spite of its open and obvious condition.

Plaintiffs conceded that the accumulation of snow behind the dumpster was an open and obvious condition, but argued the mall policy that required that dumpster lids be closed was a special aspect that made the condition unreasonably dangerous in spite of its open and obvious nature. The circuit court disagreed, and concluded that no special aspects existed that made the open and obvious condition unreasonably dangerous.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. A possessor of land may be held liable for injuries resulting from negligent maintenance of the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id.*, 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect invitees from that risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Lugo v Ameritech Corp*, 464 Mich 512, 517-519; 629 NW2d 384 (2001).

Plaintiffs argue the circuit court erred by granting defendants' motions for summary disposition. They concede the snow behind the dumpster was an open and obvious condition, but assert that because the mall required tenants to place trash in dumpsters and to close dumpster lids, Cynthia Gratopp had no alternative other than to approach the dumpster from

behind in order to close the lid. Plaintiffs assert that under these circumstances, the mall's policy constituted a special aspect of the condition that rendered the condition unreasonably dangerous in spite of its open and obvious nature. In addition, plaintiffs assert that questions of fact existed as to whether Hodgins negligently performed its contractual duties.

We affirm the circuit court's grant of summary disposition to Tanger, and vacate and remand as to Hodgins.

The Supreme Court held in *Quinlivan v Great Atlantic & Pacific Tea Co*, 395 Mich 244, 261; 235 NW2d 732 (1975), that a premises owner owes a business invitee the duty to take reasonable measures within a reasonable period of time after an accumulation of snow and ice to diminish the hazard of injury to the invitee, and rejected the proposition that ice and snow are open and obvious hazards in all circumstances and cannot give rise to liability. Subsequently, this Court has clarified that

> the snow and ice analysis in *Quinlivan* is now subsumed in the newly articulated rule set forth in *Lugo* [*supra*]. Specifically, the analysis in *Quinlivan* will now be part of whether there are special aspects of the condition that make it unreasonably dangerous even if the condition is open and obvious. [*Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 8; 649 NW2d 392 (2002).]

Cynthia Gratopp made several trips to the dumpster to dispose of trash, and on each trip approached it from the front without difficulty. She testified that she stepped to the back of the dumpster to attempt to close the lid notwithstanding the presence of snow in that area. Plaintiff presented evidence that the mall manager had requested that tenants keep their dumpster lids closed. This policy, however, was not a special aspect of the accumulation of snow behind the dumpster itself. Plaintiffs failed to demonstrate the existence of any special aspects that made the condition unreasonably dangerous in spite of its open and obvious condition. The circuit court correctly granted Tanger's motion for summary disposition. *Lugo*, *supra*; *Corey*, *supra*.

The circuit court granted summary disposition in favor of Hodgins on the ground that the condition of which plaintiffs complained was open and obvious. Hodgins was not the owner of the property on which the injury occurred; therefore, application of the open and obvious danger doctrine, an aspect of premises liability, to the issue of whether a genuine issue of fact existed as to whether Hodgins performed negligently under its contract was erroneous. As a general rule, those persons or parties foreseeably injured by the negligent performance of a contractual duty are owed a duty of care. *Joyce v Rubin*, 249 Mich App 231, 243; 642 NW2d 360 (2002). The circuit court did not address this aspect of defendant's motion and plaintiffs' claim. We therefore vacate the grant of summary disposition to Hodgins and remand for reconsideration of Hodgins' motion.

Affirmed in part, and vacated and remanded in part. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Helene N. White
/s/ Joel P. Hoekstra

EXHIBIT E

STATE OF MICHIGAN

COURT OF APPEALS

DARREN CHRETIEN,

Plaintiff-Appellant,

v

LAKESHORE MOTEL and JAMES TOUHY,

Defendants-Appellees.

UNPUBLISHED
June 8, 2001

No. 221593
Oakland Circuit Court
LC No. 98-007234-NO

Before: McDonald, P.J., and Smolenski and K. F. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Basic Facts and Procedural History

Plaintiff went to the defendant Lakeshore Hotel to check out rooms available on Valentine's Day. When he arrived at the motel, the sidewalk was icy. He proceeded to the manager's office by walking on the grass instead. He again walked on the grass when he followed the manger to view the first room. The land had a downward slope and at the top of the slope, plaintiff slipped and fell on the ice and snow.

Plaintiff filed this premises liability action, seeking damages for his injuries. Finding that the danger was open and obvious and plaintiff had intentionally chosen to encounter it, the court granted defendant's motion for summary disposition and dismissed the action.

II. The Duty Owed to Plaintiff

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Gibson v Neelis,* 227 Mich App 187, 189; 575 NW2d 313 (1997). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence

establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co,* 460 Mich 446, 455; 597 NW2d 28 (1999).

Plaintiff was an invitee in that he was on defendant's premises for a commercial purpose. *Stiff v Holland Abundant Life Fellowship,* 462 Mich 591, 597-598, 604; 614 NW2d 88 (2000), amended ____ Mich ___[1]. A landowner is subject to liability for physical harm caused to his invitees by a condition on the land only if the owner (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that it involves an unreasonable risk of harm to his invitees; (b) should expect that his invitees will not discover or realize the danger or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect his invitees against the danger. *Lawrenchuk v Riverside Arena, Inc,* 214 Mich App 431, 432-433; 542 NW2d 612 (1995). This duty is not absolute. *Douglas v Elba, Inc,* 184 Mich App 160, 163; 457 NW2d 117 (1990). It does not extend to conditions from which an unreasonable risk of harm cannot be anticipated or to open and obvious dangers. *Id.*; *Hammack v Lutheran Social Services of Michigan,* 211 Mich App 1, 6; 535 NW2d 215 (1995). Where the danger is known to the invitee or is so obvious that the invitee might reasonably be expected to discover it, the invitor owes no duty to protect or warn the invitee unless the invitor should anticipate the harm or alternatively, the risk of harm remains unreasonable despite the invitee's knowledge of it. *Bertrand v Alan Ford, Inc,* 449 Mich 606, 611; 537 NW2d 185 (1995); *Riddle v McLouth Steel Products Corp,* 440 Mich 85, 96; 485 NW2d 676 (1992).

"An invitor has a duty to take reasonable measures within a reasonable time after an accumulation of snow and ice to diminish the hazard of injury to an invitee." *Orel v Uni-Rak Sales Co, Inc,* 454 Mich 564, 567; 563 NW2d 241 (1997); *Anderson v Wiegand,* 223 Mich App 549, 553-554; 567 NW2d 452 (1997). That duty is not eliminated simply because the danger presented by ice and snow is obvious:

> [W]e reject the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability. While the invitor is not an absolute insurer of the safety of the invitee, the invitor has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation. . . . As such duty pertains to ice and snow accumulations, it will require that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee. [*Quinlivan v Great Atlantic & Pacific Tea Co, Inc,* 395 Mich 244, 261; 235 NW2d 732 (1975).]

The evidence presented showed that the walkways around defendants' premises were icy. Plaintiff therefore chose to walk on the grass which, although similarly icy, appeared safer than the walkway. If plaintiff's only choice was to encounter the icy conditions on the property, be they on the walkways or on the grass, or turn around and leave because there was no safe place to walk, the open and obvious nature of the danger created by the icy grass does not insulate defendants from liability because "the risk of harm remains unreasonable, despite its obviousness

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[1] In September of 2000, the Supreme Court remanded this matter for further consideration and determination.

or despite knowledge of it by the invitee." *Bertrand, supra,* at 611. Therefore, the trial court erred by granting defendants' motion for summary disposition.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly

EXHIBIT F

STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM P. BROUSSEAU,

Plaintiff-Appellant/Cross-Appellee,

v

DAYKIN ELECTRIC CORPORATION,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
June 7, 2002

No. 225880
Wayne Circuit Court
LC No. 95-518513-NO

Before: Cavanagh, P.J., and Gage and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order effectuating the jury verdict entered against defendant and reducing plaintiff's award of future economic damages to present value. Defendant cross-appeals as of right, challenging the trial court's decisions to deny its motions for judgment notwithstanding the verdict (JNOV), new trial, directed verdict, and remittitur, and the granting of plaintiff's motion for costs and attorney fees. We affirm in part and reverse in part.

I.

Plaintiff argues that the trial court committed reversible error when it reduced the jury verdict to present value after it had already instructed the jury to do so, effectively reducing the verdict twice. We disagree. This issue involves a question of statutory interpretation, which this Court reviews de novo. *Cheron, Inc v Don Jones, Inc,* 244 Mich App 212, 215-216; 625 NW2d 93 (2000).

"The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature." *Kokx v Bylenga,* 241 Mich App 655, 661; 617 NW2d 368 (2000). The first step in determining intent is to review the specific language of the statute itself. *In re MCI Telecommunications Complaint,* 460 Mich 396, 411; 596 NW2d 164 (1999). If the plain and ordinary meaning of the language is clear and the statute is unambiguous on its face, the Legislature is presumed to have intended the meaning expressed, and judicial construction is neither required nor permitted. *Id.*

MCL 600.6306 states in pertinent part:

> (1) After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court. Subject to section 2959, the order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:
>
> * * *
>
> (c) All future economic damages . . . reduced to gross present cash value. [MCL 600.6306(1)(c) (footnotes omitted).]

"Before 1986, under the common law, the obligation to perform the reduction of future damages to present cash value in personal injury actions was the obligation of the jury." *Nation v WDE Electric Co,* 454 Mich 489, 492; 563 NW2d 233 (1997). However, MCL 600.6306 transferred the obligation to perform that calculation to the trial judge. *Id.* The clear and unambiguous language of the statute mandates that the trial court shall reduce any future economic damages to gross present value when entering an order of judgment in favor of a plaintiff. Thus, the trial court in this case properly reduced plaintiff's award of future economic damages to present value when it entered the order of judgment.

Furthermore, plaintiff's claim that there is a presumption that juries follow the instructions of the court, and therefore, the jury's award included a reduction to present value, has been overcome by the facts in the record. We agree with defendant that it is clear from the record and the verdict form that the jury's award of future economic damages did not include a reduction to present value. Rather, the jury returned an award for future economic damages that was requested by plaintiff, $55,000 the first year and $30,000 for every year after that for the rest of plaintiff's working life as determined by the jury. Thus, the jury simply adopted the figures as requested by plaintiff when returning a verdict without making any calculations for present cash value, which would have been evidenced by a different calculated amount reduced for each year under the formula. Accordingly, we find no error in the trial court's decision to reduce plaintiff's award for future economic damages to present value.

II.

On cross-appeal, defendant argues that the trial court erred in denying its motion for JNOV. We disagree. This Court reviews de novo a trial court's decision with regard to a motion for JNOV. *Morinelli v Provident Life & Accident Ins Co,* 242 Mich App 255, 260; 617 NW2d 777 (2000). "A motion for JNOV should be granted only when there was insufficient evidence presented to create an issue for the jury." *Pontiac School Dist v Miller Canfield Paddock & Stone,* 221 Mich App 602, 612; 563 NW2d 693 (1997). "In reviewing a decision regarding a motion for JNOV, this Court must view the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party. If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand." *Morinelli, supra* at 260-261.

Defendant bases several of its arguments for reversal on the decision in *Millikin v Walton Mobile Home Park, Inc,* 234 Mich App 490; 595 NW2d 152 (1999). Defendant primarily argues that the *Millikin* Court modified the open and obvious doctrine such that this Court's prior opinion in this case was based on an incorrect standard of law. However,

defendant's reliance on *Millikin* is misplaced, and therefore, *Millikin* provides no basis for reversal.[1]

Millikin involved a premises liability action in which the plaintiff was injured after tripping on a support wire that extended from the ground at the base of her home to a utility pole. *Millikin, supra,* 234 Mich App at 491. The *Millikin* Court affirmed the trial court's grant of summary disposition in favor of defendant, finding that the open and obvious "doctrine protects against liability whenever injury would have been avoided had an 'open and obvious' danger been observed, regardless of the alleged theories of liability," including negligent maintenance of the premises. *Id.* at 495-497. However, the *Millikin* Court also went on to address whether the support wire still presented an unreasonable risk of harm as discussed in *Bertrand v Alan Ford, Inc.* 449 Mich 606, 609; 537 NW2d 185 (1995). *Id.* at 498-499. The *Millikin* Court found that the plaintiff had failed to establish anything unusual about the wire or that the wire posed an unreasonable risk of harm despite its open and obvious nature. *Id.* at 499. Accordingly, the *Millikin* decision did not limit, extend, or change the holding or rules of law outlined in *Bertrand,* and therefore, as determined in the prior *Brousseau* opinion, such principles are applicable to the facts in the instant case.

Of greater import to this appeal is the recent decision issued in *Lugo v Ameritech Corp Inc,* 464 Mich 512; 629 NW2d 384 (2001), where our Supreme Court, relying in great part upon its *Bertrand* decision, reiterated the duties imposed upon landowners under the open and obvious doctrine. The Court, speaking through Justice Taylor, noted that "the general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if specific aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo, supra,* at 517. Under this standard, the Court concluded the critical question with regard to open and obvious conditions to be:

> [W]hether there is evidence that creates a genuine issue of material fact regarding whether there are truly 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the 'special aspect' of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. [Id. at 517-518.]

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[1] In an earlier decision in this same case, *Brousseau v Daykin Electric Corp*, unpublished opinion per curiam of the Court of Appeals, decided March 27, 1998 (Docket No. 195259) (hereinafter "the *Brousseau* opinion"), this Court determined that the open and obvious nature of the condition was not dispositive of plaintiff's theory of liability based on the negligent maintenance of the premises. This Court reversed the entry of summary disposition in favor of defendant not because the open and obvious doctrine did not apply to claims for negligent maintenance, but because an invitor may still remain liable, notwithstanding an open and obvious danger, if the risk of harm remains unreasonable. The *Brousseau* opinion cited *Bertrand v Alan Ford, Inc,* 449 Mich 606, 609; 537 NW2d 185 (1995) for this principle. Consequently, this principle of law was not changed by the intervening decision in *Millikin, supra,* as defendant suggests.

The *Lugo* Court provided an example illustrating such a "special aspect" that may impose liability under the doctrine:

> An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. [*Id.* at 518.][2]

Viewing the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to plaintiff, *Morinelli, supra,* we conclude that reasonable jurors could have honestly reached different conclusions regarding whether the mound of snow posed an unreasonable risk of harm despite its open and obvious nature, and therefore, the jury verdict must stand.

The mound of snow in this case presents a classic example of an open and obvious danger in a premises liability action. The evidence established that there was nothing hidden about the mound of snow and that plaintiff had seen the mound before he decided to proceed over the snow mound. Plaintiff testified that the mound was two to three feet high, that it was icy and hard packed, that it extended the length of the well leading to the loading dock, and it is undisputed that he knew that because of its height and consistency slowly backing over the mound would not cause the truck to overcome the mound. Hence, the mound was an open and obvious condition. *Novotney v Burger King Corp, (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). However, based on the circumstances surrounding this mound of snow, plaintiff presented sufficient evidence to establish that the mound of snow, although an open and obvious risk, contained "special aspects" such that a reasonable juror could conclude that it nonetheless constituted an unreasonable danger. As such, this was a unique case where reasonable jurors could conclude that defendant had a duty to undertake reasonable precautions to protect plaintiff from that risk.

We acknowledge that the present case is a close one, but we believe that the evidence presented is substantially similar to the example provided in *Lugo* as to an open and obvious condition that has a special aspect because it is "effectively unavoidable." The mound of snow in the present case blocked the only entrance to defendant's commercial loading dock where truck drivers were to make deliveries to defendant. Unlike many other conditions that are open and obvious where a person could simply avoid the hazard by walking around it, there was no possibility of doing so in this case.[3] Indeed, the jury could reasonably conclude, based on the evidence presented, that in order to make his deliveries plaintiff effectively had no choice but to drive over the mound. Plaintiff presented lay and expert testimony that truck drivers such as plaintiff have numerous deliveries to make during the course of the day and are, therefore, on

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[2] The standards articulated in *Bertrand* and *Lugo* were recently affirmed by the Supreme Court in *Perkoviq v Delcor Homes – Lake Shore Pointe, Ltd,* __ Mich __; __ NW2d __ (Docket No. 116059, issued April 24, 2002).

[3] See, e.g., *Corey v Davenport College of Business,* ___ Mich App ___; ___ NW2d ___ (Docket No. 206185, issued April 26, 2002).

strict timelines. And, as noted, plaintiff could not drive around the mound and had no reasonable alternative to make the delivery. Thus, the mound of snow was effectively unavoidable, forcing plaintiff to encounter the condition.[4] Viewing this evidence and all reasonable inferences in a light most favorable to plaintiff, as the trial court was required to do, plaintiff submitted sufficient admissible evidence to allow a jury to conclude that there were special aspects about the mound of snow at issue to establish that it posed an unreasonable risk to him. Accordingly, reasonable jurors could find that defendant breached a duty of reasonable care under these specific circumstances. The trial court did not err in denying defendant's motion for JNOV.

Defendant's reliance on *Joyce v Rubin,* 249 Mich App 231; 642 NW2d 360 (2002), is misplaced. In *Joyce*, this Court held that although the issue presented a "close case," the slippery spots on a sidewalk caused by snow were not the type of special aspects contemplated by *Lugo* because the spots were not unavoidable, as plaintiff testified that "she *walked around the regular pathway* to avoid the slippery condition." *Id,* at 242 (emphasis in original). In the instant case, however, plaintiff was presented with the situation discussed in *Lugo* – only one loading dock which could only be reached by going over the mound. Hence, although this too is a "close case," we find that the evidence presented placed this case in the narrow realm of cases that present a special aspect given the effective inability for plaintiff to have avoided the openly obvious condition. See, also, *Woodbury v Bruckner* (*On Remand*), 248 Mich App 684, 694; ___ NW2d ___ (2002).

Defendant also argues that the trial court erred in denying its motion for JNOV based on plaintiff's misconduct in submitting an affidavit containing false statements in opposition to defendant's motion for summary disposition. In reviewing a trial court's denial of a motion for JNOV, this Court's inquiry involves the question of whether there was sufficient evidence presented to create a triable issue of material fact for the jury. *Pontiac School Dist, supra.* However, because defendant presents no authority to support its claim that plaintiff's misconduct entitles it to a JNOV, this issue is deemed "abandoned on appeal as being insufficiently briefed." *Dresden v Detroit Macomb Hospital Corp,* 218 Mich App 292, 300; 553 NW2d 387 (1996). Furthermore, plaintiff's alleged misconduct was either not erroneous or harmless, and therefore, cannot provide a basis for ordering a JNOV or a new trial. See *Szymanski v Brown*, 221 Mich App 423, 427; 562 NW2d 212 (1997). First, the *Brousseau* Court did not rely on plaintiff's affidavit in reversing the trial court's grant of summary disposition as the Court stated that the affidavit was "not material to a motion under MCR 2.116(C)(8)." Second, defendant was not denied a fair trial because plaintiff's testimony was effectively impeached with the statements made in the affidavit. Accordingly, the trial court did not err in denying defendant's motion for JNOV.

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[4] Defendant's argument that the mound was avoidable because plaintiff had the alternative of calling his employer or asking defendant to have its employees remove the mound is misplaced. We note that the hypothetical plaintiff in the *Lugo* example surely could have not exited the building and instead asked an employee to clean up the water. We believe *Lugo's* example was utilized to emphasize that there can be liability imposed upon premises owners when the *location* of the open and obvious condition and the circumstances of the plaintiff (ie, an inability to exit without traversing over the water) are such that the plaintiff effectively had no choice but to encounter the condition. *Lugo, supra,* at 519 n 2.

III.

Defendant next argues that the trial court erred in denying its motion for a new trial. We disagree. "A trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion." *Meyer v City of Centerline*, 242 Mich App 560, 564; 619 NW2d 182 (2000). The trial court's function in deciding a motion for a new trial is to determine whether the overwhelming weight of the evidence favors the losing party and its conclusion that the verdict was not against the great weight of the evidence is given substantial deference by this Court. *Morinelli, supra* at 261. Furthermore, when a party claims that a jury's verdict was against the great weight of the evidence, this Court may overturn that verdict only when it was manifestly against the clear weight of the evidence, but the jury's verdict should not be set aside if there is competent evidence to support it. *Ellsworth v Hotel Corp of America,* 236 Mich App 185, 194; 600 NW2d 129 (1999).

Defendant first claims that a new trial should have been granted because the great weight of the evidence established that the dangerous nature of the mound of snow was apparent, that plaintiff had alternatives to encountering the mound, and that defendant could not have expected that plaintiff would proceed to encounter the danger posed by the snow when plaintiff had viable alternatives to doing so. However, as was previously discussed, plaintiff presented sufficient competent evidence to establish that despite its open and obvious nature the mound of snow still posed an unreasonable risk of harm under the circumstances given its special aspects and that defendant had reason to expect that plaintiff would encounter it. Accordingly, the jury's verdict was not against the great weight of the evidence and the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant also claims that it was entitled to a new trial because the jury's finding that plaintiff was not comparatively negligent was against the great weight of the evidence. Both parties disputed the reasonableness of plaintiff's conduct. Although defendant presented evidence of the alternatives available to plaintiff to encountering the mound of snow, such as calling his dispatcher or requesting assistance from defendant, plaintiff's expert testified that plaintiff's conduct in trying to overcome the mound of snow to make a timely delivery was reasonable in the trucking industry, especially when plaintiff observed another similar truck drive over the mound without incident just prior to plaintiff's accident. Furthermore, although defendant disputed that plaintiff was wearing a seatbelt through expert testimony of its own, plaintiff testified that he was wearing his seatbelt. "This Court gives deference to the trial court's unique ability to judge the weight and credibility of the testimony . . . ." *Ellsworth, supra.* Thus, the jury verdict finding plaintiff not negligent, was not against the clear weight of the evidence. Accordingly, this Court cannot conclude that the trial court abused its discretion in denying defendant's motion for a new trial.

Defendant further claims that the trial court's failure to instruct the jury in accordance with *Millikin* requires a new trial. A requested jury instruction must be given if it is applicable and accurately states the law. However, this determination rests within the sound discretion of the trial court. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997); *Pontiac School Dist, supra* at 622.

In this case, defendant's requested instruction was incomplete and, therefore, constituted an inaccurate statement of the law. As previously discussed, *Millikin's* holding that the open and

obvious doctrine was applicable to claims of negligent maintenance did not change the holding in *Bertrand, supra*, that a possessor of land is not relieved of liability for a dangerous condition on the premises, despite its obviousness or despite knowledge of it by the invitee, if the risk of harm remains unreasonable. Rather, the trial court properly instructed the jury in accordance with *Millikin,* because the *Millikin* decision recognized that an invitor remains liable for an open and obvious danger if it posed an unreasonable risk of harm. *Millikin, supra* at 499. Thus, the trial court did not err in refusing to give defendant's special jury instruction.

Last, defendant claims that it was entitled to a new trial because the trial court erred in allowing plaintiff's damage expert, Dr. Robert Ancell, to testify regarding plaintiff's fringe benefits when plaintiff failed to plead or request special damages beyond wages. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). However, defendant failed to preserve the challenge to the admission of this testimony regarding the benefits package because defendant failed to timely object to the evidence on this ground at trial[5] and no error affecting substantial rights has been shown. *Meagher v Wayne State University,* 222 Mich App 700, 724; 565 NW2d 401 (1997); MRE 103(a)(1) and (d). Therefore, defendant is not entitled to appellate review of this issue.

In addition, defendant's one sentence argument that the trial court erred in admitting Ancell's testimony without requiring defendant to produce the underlying Teamsters contract and without establishing that Ancell was qualified to testify with respect to benefits packages is also unpreserved as defendant failed to object on these grounds at trial.[6] Moreover, this one sentence argument has not been properly presented or briefed for appeal as defendant may not merely assert error and leave it to this Court to make its argument and search for authority to support its position. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Accordingly, this Court need not address these issues.

IV.

Next, defendant argues that the trial court erred in denying its motion for a directed verdict. We disagree. In order to properly preserve an issue regarding a motion for directed verdict, a party must make a motion for directed verdict, stating specific grounds in support of the motion. *Garabedian v William Beaumont Hospital,* 208 Mich App 473, 475; 528 NW2d 809 (1995); MCR 2.515. On appeal, this Court will not review grounds for sustaining a directed verdict that were not articulated to the trial court. *Id.*

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[5] We also note that defendant's specific objection to the admission of evidence regarding "pension loss" was insufficient to preserve this issue for appeal because fringe benefits include more than just pension benefits. See MCL 408.471(1)(e); Black's Law Dictionary 667-668 (6th ed. 1990).

[6] However, defendant did object on the grounds that plaintiff did not establish any foundation for how Ancell would know the salaries of truck drivers and how they would go up. Thereafter, plaintiff laid a foundation and Ancell's testimony regarding benefits packages was admitted without further objection by defendant.

"This Court reviews de novo the grant or denial of a directed verdict. In reviewing the trial court's decision, we view the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed." *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679; __ NW2d __ (2001). If no factual questions exist on which reasonable jurors could differ then a directed verdict is properly granted. *Id.* at 679-680. However, a directed verdict is not appropriate if reasonable jurors could reach different conclusions and this Court should not substitute its judgment for that of the jury. *Id.* at 680.

Defendant first contends that the trial court erred in denying its motion for directed verdict because plaintiff failed to present any evidence to establish that defendant had reason to expect that plaintiff would proceed to encounter the mound of snow. Again, viewing the testimony and all reasonable inferences in the light most favorable to plaintiff, plaintiff presented sufficient evidence to raise a question of material fact as to whether defendant had reason to expect that plaintiff would encounter the danger posed by the mound of snow. It was not necessary for plaintiff to present explicit admissions by defendant in order to establish what defendant had reason to expect, as logical and reasonable inferences could be drawn by the jury from the evidence presented regarding the location and appearance of the mound of snow as well as the evidence that another truck negotiated the mound of snow while defendant's employee watched. Therefore, defendant's motion for a directed verdict was properly denied.

Defendant also argues that plaintiff failed to comply with the standards established by the *Millikin* decision because the evidence conclusively established that the mound of snow was open and obvious. Because defendant failed to articulate this ground in support of its motion for a directed verdict before the trial court, it is not preserved for this Court's review. *Garabedian, supra.* Nonetheless, as we concluded earlier, defendant's reliance on *Millikin, supra*, is without merit as the holding in *Millikin* does not change the standard applicable in this case.

V.

Defendant also argues that the trial court erred in denying its motion for remittitur when the jury's verdict was excessive and unsupported by the evidence. We disagree. A trial court's decision regarding remittitur is reviewed on appeal for an abuse of discretion. *Palenkas v Beaumont Hospital*, 432 Mich 527, 531, 533; 443 NW2d 354 (1989). Remittitur should only be exercised when the verdict is excessive. *Id.* at 531. Thus, the inquiry is whether the jury award is supported by the evidence. *Id.* at 531-532. This determination "should be limited to objective considerations relating to the actual conduct of the trial or to the evidence adduced." *Id.* at 532. Further, an appellate court must accord due deference to the trial court's decision regarding remittitur because "[t]he trial court, having witnessed all the testimony and evidence as well as having had the unique opportunity to evaluate the jury's reactions to the proofs and to the individual witnesses, is in the best position to make an informed decision regarding the excessiveness of the verdict." *Id.* at 531.

Defendant argues that the trial court erred in denying its motion for remittitur because the jury verdict finding plaintiff not comparatively negligent was unsupported by the evidence. However, as previously noted, the issue regarding plaintiff's negligence was highly contested at trial and plaintiff presented evidence to create an issue of material fact for the jury regarding the

reasonableness of plaintiff's conduct and the standard of care owed by defendant. This Court gives due deference to the trial court's ability to judge the credibility of the witnesses and this Court may not substitute its judgment for that of the trial judge unless an abuse of discretion is shown. *Id.* at 533. Thus, because the jury award was supported by the evidence, the trial court did not abuse its discretion in denying defendant's motion for remittitur.

VI.

Last, defendant argues that the trial court erred in awarding plaintiff excessive attorney fees and costs. This Court reviews a trial court's decision to award attorney fees and costs for an abuse of discretion. *Egan v City of Detroit*, 150 Mich App 14, 28; 387 NW2d 861 (1986).

Defendant first claims that the trial court erred in awarding plaintiff attorney fees from the date of mediation. We agree. By rejecting the mediation evaluation, defendant became liable to pay as a sanction plaintiff's "actual costs" when this suit concluded with a jury verdict in favor of plaintiff. MCR 2.403(O). MCR 2.403(O)(6) provides that "actual costs are those costs taxable in any civil action, and a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services *necessitated by the rejection of the case evaluation*." MCR 2.403(O)(6)(a) and (b) (emphasis added). However, "attorney fees incurred prior to the deadline for accepting or rejecting a mediation evaluation are not taxable as costs pursuant to MCR 2.403(O). . . . Prior to that time, a party cannot know whether the opposing party's decision will require preparation for a trial." *Taylor v Anesthesia Associates of Muskegon, PC*, 179 Mich App 384, 386-387; 445 NW2d 525 (1989). In this case, the parties rejected the mediation evaluation by allowing the twenty-eight day period for acceptance or rejection to pass. Thus, defendant was only liable for attorney fees from the day after the expiration of the twenty-eight day period for acceptance or rejection of the mediation evaluation. See *id.* Accordingly, the trial court abused its discretion in awarding plaintiff attorney fees from the date of mediation.[7]

In regard to defendant's argument concerning the trial court's award of excess costs, defendant fails to specify which costs it claims to be excessive and unauthorized by statute. Defendant only states that the trial court "allowed costs for taking depositions, which were not submitted into evidence in trial or used for purposes of impeachment." It is well established that a party cannot simply "announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel or elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham, supra.* This argument is therefore deemed abandoned on appeal. *Id.*

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[7] We understand the trial court's rationale for awarding these costs because of the short time the parties had to prepare for trial. However, in deciding this issue we are constrained by the plain language of the court rule. Additionally, although plaintiff argues that disallowing these costs under MCR 2.403(O)(6) would create an absurd result, we note that whether an absurd result occurs is not a relevant consideration when interpreting a plain and unambiguous court rule. *People v McIntire*, 461 Mich 147, 155-156, n 2; 599 NW2d 102 (1999).

Affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Christopher M. Murray

EXHIBIT G

STATE OF MICHIGAN

COURT OF APPEALS

RICHARD D. LaRUE and CATHY LaRUE,

Plaintiffs-Appellants,

v

RICHARD E. JACOBS GROUP, d/b/a FASHION SQUARE MALL,

Defendant-Appellee,

and

DOC HEINZ CONTRACTING, INC.,

Defendant.

UNPUBLISHED
October 29, 1999

No. 211741
Saginaw Circuit Court
LC No. 96-013353 NO

Before: O'Connell, P.J. and Talbot and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant Richard E. Jacobs Group, doing business as Fashion Square Mall, in this premises liability action. We affirm.

We review the trial court's decision whether to grant the motion for summary disposition de novo to determine whether any genuine issue of material fact exists that would prevent entering judgment for the moving party as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). In making this determination, we view the documentary evidence in a light favoring the nonmoving party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

Plaintiffs argue that the pile of snow over which plaintiff Richard LaRue[1] walked to get to defendant's shopping mall, and on which he slipped and fell, presented an unreasonable risk of harm despite its open and obvious nature. The trial court disagreed, and granted defendant's motion for summary disposition.[2]

The parties do not dispute that plaintiff was an invitee on defendant's premises.[3] An invitor owes a duty "'to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land' that the [invitor] knows or should know the invitees will not discover, realize, or protect themselves against." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). See also 2 Restatement Torts 2d, § 343, pp 215-216. However, an invitor generally has no duty to warn or protect an invitee of open and obvious dangers. *Bertrand, supra* at 610-611; *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96 485 NW2d 676 (1992); *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 495-497; 595 NW2d 152 (1999). The parties also do not dispute that the danger presented by the snow bank was open and obvious.[4]

The open-and-obvious-danger doctrine generally relieves the invitor of the duty to warn or protect the invitee of open and obvious dangers; however, the invitor still owes a duty to protect the invitee from conditions that pose an unreasonable risk of harm despite their open and obvious nature. *Bertrand, supra* at 610-611; *Riddle, supra* at 96; *Millikin, supra* at 498; *Hughes v PMG Building, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997). Michigan courts have approvingly cited the following rule from the Second Restatement of Torts:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. [2 Restatement Torts 2d, § 343A(1), p 218.]

This rule has sometimes been stated in terms of whether the risk remains unreasonable despite its open and obvious nature. *Bertrand, supra* at 611 ("[I]f the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions."); *Millikin, supra* at 498 (holding that summary disposition for the defendant was appropriate where the plaintiff failed to present facts that the dangerous condition posed an unreasonable risk despite its open and obvious nature). Other times, the rule has been stated in terms of whether the harm was foreseeable despite the open and obvious nature of the condition. *Bertrand, supra* at 610-611 ("While there may be no obligation to warn of a fully obvious condition, the possessor still may have a duty to protect an invitee against foreseeably dangerous conditions."); *Riddle, supra* at 96 ("However, where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee."); *Hughes, supra* at 10 ("[E]ven if a danger is open and obvious, a possessor of land may still have a duty to protect invitees against foreseeably dangerous conditions."). We conclude that under the facts and circumstances of this case, both characterizations of the rule are accurate—a risk that remains unreasonable despite its open and obvious nature is one where harm will foreseeably occur despite that open and obvious nature.[5]

In this case, the trial court correctly concluded that plaintiffs did not present any factual basis for concluding that the snow bank presented an unreasonable risk despite its open and obvious nature. The

nature of the snow bank, even with the presence of the path created by other patrons and employees of the mall, is commonplace during winter months in Michigan. Plaintiff had observed similar snow banks at the mall on many previous occasions. On the date of his injury, plaintiff chose to walk over the snow bank rather than around it. Plaintiff could have avoided the danger but did not. Merely because other persons also chose not to avoid the danger, thus creating a makeshift "path" over the snow bank, does not render it foreseeable that injury will occur despite the open and obvious nature of the condition—especially where it was abundantly simple for plaintiff to avoid the danger altogether by walking around the snow bank. Accordingly, the trial court did not err in granting summary disposition in favor of defendant.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Brian K. Zahra

[1] Because plaintiff Richard LaRue was the person who slipped and fell, and because his wife Cathy LaRue was added as a plaintiff to claim loss of consortium, any further references in this opinion to "plaintiff" refer solely to plaintiff Richard LaRue.

[2] The trial court also denied plaintiff's motion for reconsideration pursuant to MCR 2.119(F).

[3] An invitee is a person who is invited to enter or remain on the premises either for a purpose for which the premises are held open to the public or for a purpose connected with the business of the possessor of the premises. *Stitt v Holland Abundant Life Fellowship*, 229 Mich App 504, 506-508; 582 NW2d 849 (1998), citing 2 Restatement Torts, 2d, § 332, p 176.

[4] A danger is open and obvious where "it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *Hughes v PMG Building, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997).

[5] We note that our Supreme Court recently split evenly on the proper characterization of this rule. In *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135; 565 NW2d 383 (1997), Justices Weaver, Boyle, and Riley held that the question is not the foreseeability of the harm, but rather, whether the risk of harm remains unreasonable despite its open and obvious nature. *Id.* at 142-143. However, Justices Mallett, Brickley, and Cavanagh maintained that the invitor "may still be liable to invitees if he should anticipate that the hazard will cause injury." *Id.* at 146. Justice Kelly did not participate in the decision.

EXHIBIT H

STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH LINDSAY,

Plaintiff-Appellant,

v

KLRF MANAGEMENT, SOUTH MONROE PLAZA and MONROE MANAGEMENT COMPANY,

Defendants-Appellees.

UNPUBLISHED
October 15, 1999

No. 211701
Monroe Circuit Court
LC No. 97-006912 NO

Before: Neff, P.J., and Murphy and J. B. Sullivan*, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right an order granting summary disposition in favor of defendants. We affirm.

Plaintiff contends that the trial court erred when it granted summary disposition pursuant to MCR 2.116(C)(10) because defendants should have known that an unreasonable risk of harm existed in a sidewalk with broken concrete and an exposed pipe. Further, defendants failed to exercise reasonable care to make the condition safe. We disagree.

A trial court's grant of summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* A court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. *Id.* If the party opposing the motion fails to present evidentiary proofs creating a genuine issue of material fact, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455 & n 2; 597 NW2d 28 (1999).

In a negligence action, summary disposition is proper if, as a matter of law, the defendant owed no duty to the plaintiff under the alleged facts. *Eason v Coggins Memorial Christian*

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Methodist Episcopal Church, 210 Mich App 261, 263; 532 NW2d 882 (1995). Ordinarily, questions regarding duty are for the court to decide as a matter of law. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 397; 566 NW2d 199 (1997).

A possessor of land owes no duty regarding open and obvious dangers. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 495-497; 595 NW2d 152 (1999); *White v Badalamenti*, 200 Mich App 434, 437; 505 NW2d 8 (1993). A condition is open and obvious if an average user with ordinary intelligence would have discovered the danger and risk presented upon a casual inspection. *Hughes v PMG Building, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997). However, even if a danger is open and obvious, a possessor of land may still have a duty to protect invitees against foreseeably dangerous conditions:

> [T]he rule generated is that if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. On the other hand, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions. The issue then becomes the standard of care and is for the jury to decide. [*Id.*, quoting *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995).]

Thus, if there are genuine issues of fact regarding an unreasonable risk of harm, then duty and breach are jury questions, and summary disposition is improper. *Millikin*, *supra* at 498-499.

Here, the open and obvious doctrine cuts off defendants' liability. The broken concrete in the sidewalk, with the exposed drainpipe, was not hidden. Rather, it was easily observable upon casual inspection by any average person walking near it. Plaintiff was not watching where he was walking. Had plaintiff glanced down at the path in which he was walking, he would have noticed the pipe and the break in the concrete.

Because the condition was open and obvious, the relevant inquiry is whether the risk of harm remained unreasonable even though it was obvious. In the instant case, the condition of the sidewalk did not present a foreseeably dangerous condition because it could have been easily avoided. The broken sidewalk with the pipe was not in a location where individuals were forced to walk. The affidavit of the manager of defendants KLRF Management and Monroe Management Company established that no other injuries were reported at the shopping plaza as a result of the condition of the sidewalk before or after plaintiff fell. The condition of the sidewalk did not present an unreasonable risk because it was not foreseeable that someone would not be able to easily avoid the pipe. Accordingly, the open and obvious doctrine negates any duty that defendants owed to plaintiff regarding the condition of the sidewalk.

Plaintiff also argues that the trial court erred when it granted defendants' motion for summary disposition where comparative negligence does not bar his recovery. As discussed

above, defendants owed plaintiff no duty with regard to the sidewalk and exposed pipe. Thus, plaintiff's comparative negligence is irrelevant.

Affirmed.

/s/ Janet T. Neff
/s/ William B. Murphy
/s/ Joseph B. Sullivan